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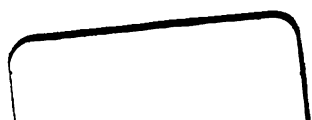
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THE

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

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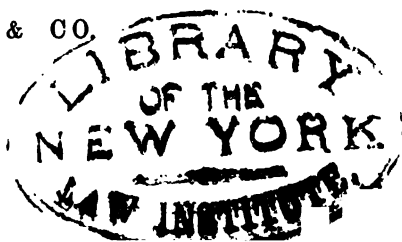
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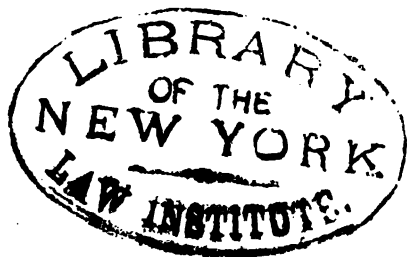
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PREFACE TO VOLUME XLI.

WE have here several decisions which are important or even leading cases in their respective lines. *Armstrong v. Armstrong*, p. 10, on agreements in evasion of the law; *Murray v. Barlee*, p. 52, on the nature of a married woman's "engagements" affecting her separate property (a doctrine not yet quite supplanted by the Married Women's Property Acts); *Kennedy v. Green*, p. 176, on constructive notice of fraud; *Hipwell v. Knight*, p. 304, on the circumstances in which time is of the essence of a contract in equity; *Prosser v. Edmonds*, p. 322, on the intricate subject of champerty; *Green v. Button*, p. 818, on slander of title—these are all exceedingly well known. *Flight v. Booth*, p. 599, is a considerable authority as to misrepresentation on sale of land. It is curious that the head-note, as it stands in the original report, omits the only fact that makes the case interesting or arguable in the eyes of a conveyancer, namely, the existence of a condition that errors of description should not annul the sale.

The point of the decision consists in limiting the effect of such a condition to errors not amounting to such substantial misstatement as will mislead the purchaser as to what he is really buying.

In *Doorman v. Jenkins*, p. 429, the position of a gratuitous bailee is discussed, and we meet, in the judgment of Taunton J., with the opinion that "gross negligence" is not a distinct kind of negligence known to the law, but only negligence in an aggravated degree. This opinion was afterwards fortified by the high authority of the late Willes J., and has on the whole prevailed.

There is an unconscious fitness in the name of *Philpott v. Jones*, a case on the "Tippling Act" (p. 371).

Ball v. Cullimore, p. 699, exhibits, in full accordance with older authorities, the feebleness of a tenant at will's estate. A lessor for years cannot convey by livery of seisin during the term, having neither immediate possession nor the right thereto. But if a lessor at will enters for the purpose of giving seisin, the entry is itself a determination of his will and of the tenant's estate, and there remains nothing to hinder his intention from taking full effect. Tenants at will are not common nowadays (in fact, the relatively modern decisions on them are due to the want of power to recognize equitable interests in

the old Courts of common law); but bailments of chattels at will are possible and common enough, and the analogies will be found instructive. Cp. *Nicolls v. Bastard*, in the present volume, pp. 814, 816.

F. P.



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1834—1836.

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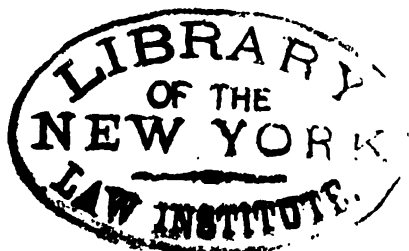
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NOTE.



The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.



The Revised Reports.

VOL. XLI.

CHANCERY.

LOVEGROVE *v.* NELSON AND COX.

(3 Myl. & Keen, 1—25; S. C. 3 L. J. (N. S.) Ch. 108.)

Partnership articles may authorize a third person to nominate a new member or members of the partnership at any future time, and the nomination thus made will effectually create the relation of partnership between the then existing partners and the person thus introduced by nomination.

THE actual question in this case turned chiefly upon the construction of an imperfectly worded contract between the Postmaster-General and two persons supplying horses for mail coaches over a specified route, divided into sections between the persons contracting. These persons were jointly responsible to the Postmaster-General, and the receipts were divided between themselves in proportion to the mileage of their respective sections. The contract empowered the Postmaster-General in certain events to dismiss either of the contracting parties, and to require the other contracting party either to work his section or to admit some other person to be approved by the Postmaster-General to work the same. By arrangement between the Postmaster-General and one of the contracting parties, part of his section had been worked by a third person (the plaintiff). This arrangement was not authorized by the contract, but the

1834.

Jan. 23.

Rolls Court.
LEACH, M.R.

On Appeal.
June 17.
Aug. 7.

Lord
BROUGHAM,
L.C.
[1]

LOVEGROVE
v.
NELSON.

other contracting party, who was a defendant, had acquiesced in it, and the LORD CHANCELLOR held on appeal that under the circumstances the defendant could not dispute the plaintiff's claim to be treated as if he had been duly introduced to the business as a partner upon the requisition of the Postmaster-General under the contract.

[20] In the course of his judgment the LORD CHANCELLOR said :]
To make a person a partner with two others, their consent must clearly be had, but there is no particular mode or time required of giving that consent ; and if three enter into partnership by a contract which provides that, on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract which the Court must perform, and that the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name. The present contract is of this description ; and if the manner of executing the power of nomination be pursued by the Postmaster-General, the successor to the vacant place comes in, strictly speaking, by the previous consent of the whole body of contractors. * * *

1834.
Jan. 22.

Rolls Court.
LEACH, M.R.
[26]

WEISS v. DILL (1).

(3 Myl. & Keen, 26—28.)

Executors will not be allowed to charge for the employment of an agent, except under very special circumstances.

An executor's charge for the employment of an agent to collect debts due to the testator reduced from 5 per cent. to 2½ per cent.

THIS was an exception on the part of the defendants to the Master's report. The testator, Jacob Weiss, who had carried on an extensive business as a tailor, bequeathed the residue of his personal estate upon trust for his wife and children, and he appointed the defendants, Dill and Broughton, his executors. He directed his debts to be collected with all convenient speed, and that his executors, or the survivor of them, should, at their or his discretion, carry on the business, and apply the profits to

(1) *Hopkinson v. Roe* (1838) 1 Beav. 180; *In re Ames* (1882) 25 Ch. D. 72.

the same trusts as those declared with respect to his personal estate. No legacy was given to the executors. The defendants employed an agent to collect the testator's debts, and the agent had collected debts to the amount of 2,000*l.*, upon which he charged a commission of 5 per cent. This charge of 5 per cent. for agency was disallowed by the Master in the executor's accounts, and reduced to 2½ per cent. To that disallowance the present exception was taken.

WEISS
v.
DILL.

Mr. Bethell, in support of the exception [cited] *Wilkinson v. Wilkinson* (1), where annuities were given to trustees for their trouble, and the testator *died possessed of houses let at weekly rents; it was held that the trustees were justified in employing, at a certain charge, a collector of the weekly rents, and did not thereby forfeit their right to the annuities. In the present case, the debts were very numerous; and the payment of them was not obtained until after repeated applications. * * *

[*27]

Mr. Pemberton and *Mr. Richards*, *contra*. * * *

THE MASTER OF THE ROLLS :

Generally speaking, executors are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred by the employment of agents. It is for the Master to determine whether an executor who makes a claim for the employment of an agent ought to be allowed to charge his testator's estate with such a burthen. The Master has here thought that the executor ought not to be allowed to charge the testator's *estate with the whole commission claimed, but that 2½ per cent. is a fit allowance. I have some doubt whether, in this case, the Master ought to have made any allowance; but with the allowance of 2½ per cent. which he has made, the defendants must be content.

[*28]

Exception over-ruled.

1835.

July 28, 29.

Rolls Court.

PEPYS, M.R.

[29]

MANNING v. THESIGER.

(3 Myl. & Keen, 29—31; S. C. 4 L. J. (N. S.) Ch. 285.)

A testatrix gave the sum of 100*l.*, to be paid to her brother C. T. immediately after the decease of her husband and in default of issue of their marriage; and in a subsequent part of her will she gave 100*l.* to the same brother, and concluded her will by directing that legacies to which no time of payment was affixed, should be paid within three months after the death of her husband: Held, that the testatrix intended only to give a single legacy of 100*l.* to C. T.

THE will of Mary Welsford, made in execution of a power, contained the following bequests: "I give to my brother, Christopher Thornton, of London, from and immediately after the decease of my husband, Roger Welsford, and in default or failure of issue of our marriage, the sum of 100*l.* sterling. Also to my said brother, Christopher Thornton, one clear annuity or yearly sum of 50*l.* sterling, for and during the term of his natural life, to commence from the day of the decease of my said husband, Roger Welsford, and such default or failure of issue as aforesaid, and to be paid to him half yearly. Also to my brother, Christopher Thornton, of or near the city of London, the sum of 100*l.* sterling." The testatrix concluded her will by directing that all and every the legacies and sums of money given by her will, wherein no time was specified as to the payment thereof, were to be paid within three months after her husband's decease, and such default or failure of issue as aforesaid.

There was no issue of the marriage; and the question was, whether the second legacy of 100*l.* given to Christopher Thornton was or was not accumulative.

Mr. W. C. L. Keene, in support of the claim of Christopher Thornton [cited *Mackenzie v. Mackenzie* (1):]

[30]

* * In the present case, the first legacy of 100*l.* was directed to be paid to Christopher Thornton immediately after the death of the testatrix's husband, and in default of issue of the marriage of the testatrix and her husband; the second legacy of 100*l.* was given without any direction as to the time of payment, or any reference

to the contingency of her dying without issue. If the will had stopped at the gift of the second legacy, it might have been said that the omission of any direction as to the time of paying the second legacy was accidental; but that argument could not be resorted to, because the testatrix had expressly declared that, where she had given legacies and affixed no time of payment, she meant such legacies to be paid within three months after the decease of her husband. The circumstances distinguishing the two gifts were quite sufficient to show that the testatrix intended the second legacy of 100*l.* to be accumulative. * * *

MANNING
v.
THESIGER.

Mr. Tinney, contra:

[31]

The general rule is, that where the same sum is twice given to the same legatee, the second gift is to be considered, not as accumulative, but as a mere accidental repetition of the first: *Duke of St. Albans v. Beauclerk* (1), *Holford v. Wood* (2), *Garth v. Meyrick* (3). This rule is not to be departed from, unless it can be clearly shewn to have been the intention of the testator to give the second legacy in addition to the first; and in the present case, the circumstances relied upon as indicating such an intention, are much too slight to justify such a conclusion.

THE MASTER OF THE ROLLS (4):

July 29.

I am of opinion that the testatrix in this case intended only to give a single legacy of 100*l.* to Christopher Thornton.

FORTESCUE *v.* BARNETT (5).

(3 Myl. & Keen, 36—44; S. C. 3 L. J. (N. S.) Ch. 106.)

1834.
Jan. 20.

A voluntary settlement of a policy of assurance upon the settlor's life was executed and delivered by the settlor to one of the trustees, but the settlor kept the policy in his own possession. No notice of the assignment was given to the assurance office, and the settlor afterwards surrendered the policy and a bonus declared upon it, to the assurance

Rolls Court.
LEACH, M.R.
[36]

(1) 2 Atk. 636.
(2) 4 Ves. 76, where an annuity of 30*l.* given by will to a servant was repeated in a later part of the will and the application of the rule was scarcely contested on his

behalf.—O. A. S.
(3) 1 Br. C. C. 30.
(4) Sir C. Pepys.
(5) *Sewell v. King* (1879) 14 Ch. D. 179; 49 L. J. Ch. 73.

FORTESCUE
v.
BARNETT.

office for value. Upon a bill filed by the surviving trustee of the deed, to have the value of the policy replaced by the settlor, the COURT held that, upon the delivery of the deed, no act remained to be done by the grantor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed.

THE defendant, John Barnett, shortly after the intermarriage of his sister, Mary Barnett, with Henry White, executed an indenture dated the 17th of December, 1818, and made between himself of the first part, the said Henry White, since deceased, of the second part, Mary White, the wife of Henry White, of the third part, and the plaintiff William Fortescue, and Thomas White, deceased, of the fourth part, whereby, after reciting that the Equitable Assurance Society had, by a policy of assurance dated the 27th of September, 1811, assured to be paid to the executors, administrators, and assigns of John Barnett after his decease 1,000*l.* on payment of the annual premium of 25*l.* 11*s.*, it was witnessed that in consideration of the marriage then lately solemnised between Henry White and Mary White, and for making some provision for the said Mary White and her child and children, if she, or any such child or children, should survive John Barnett, he, the said John Barnett, assigned and transferred to William Fortescue and Thomas White the said policy of assurance, and the sum of 1,000*l.* thereby assured, and

[*37] *all interest and produce to become due or payable by virtue thereof, and all his right and interest therein, to hold to William Fortescue and Thomas White, their executors, administrators, or assigns upon trust, in case Mary White and all and every her child and children should happen to die in the lifetime of John Barnett, for John Barnett, his executors, administrators, and assigns, and to reassign the same to him and them accordingly; but if Mary White, or any child or children of Mary White, should happen to outlive John Barnett, then in trust, that William Fortescue, and Thomas White, their executors, administrators, or assigns, should invest the said sum of 1,000*l.*, and all other money which should become due on the said policy, in the public stocks or funds upon the trusts therein declared for the benefit of Mary White and her child or children. The deed contained a covenant on the part of John Barnett for himself,

his executors and administrators, to pay and keep up the annual premiums payable upon the policy.

FORTESCUE
v.
BARNETT.

This deed was delivered to Thomas White, one of the trustees named therein, and remained in his possession till his death, which happened in October, 1832; but the defendant Barnett retained possession of the policy of assurance.

Shortly after the death of Thomas White, the deed was sent by one of his executors to William Fortescue, the surviving trustee, who, upon application at the office of the Equitable Assurance Society, was informed that no notice had ever been given to the Society of the assignment of the policy; that in July, 1830, a bonus of 795*l.*, payable upon the death of John Barnett, had been declared on the policy, which bonus was surrendered by Barnett to the Society in the same month *of July, in consideration of the sum of 394*l.* 15*s.*; and that in November, 1832, Barnett surrendered the policy itself to the Society, in consideration of the further sum of 326*l.* 13*s.*

[*38]

The bill was originally filed by Fortescue against Barnett alone, for the purpose of compelling him to replace or give security for the value of the policy and bonus so surrendered, and of all bonuses which might have accrued, or have been capable of being declared thereafter, if the policy had not been surrendered; but the defendant demurred to the bill for want of parties, and, the demurrer being allowed, Mrs. White and her children were made parties by amendment, leave having been given for that purpose.

The bill prayed that the defendant Barnett might be decreed to pay to the plaintiff, or otherwise secure upon the trusts of the indenture of the 17th of December, 1813, the sum of 1,795*l.*, being the amount of the sum secured by the policy, together with the bonus declared thereon, and such further sum as should be sufficient to answer all future bonuses which, according to the regulations of the Equitable Assurance Company, would have accrued due in respect of the policy, if it had not been surrendered. * * *

The question in the cause was, whether the defendant was or was not bound to replace or give security for the value of the policy.

[39]

FORTESCUE
v.
BARNETT.
[40]

[*41]

Mr. Bickersteth and Mr. Willcock, for the plaintiff [cited *Ex parte Pye* (1)]. The only question in the present case, is, whether any thing was wanting to the completion of the gift under the settlement. It appears upon the authorities that, even if the grantor had kept the deed itself in his possession, he could not have defeated the trusts which he had once created; still less could he defeat those trusts by the mere non-delivery of the policy. The gift of all the defendant's interest in the policy was perfect upon the delivery of the deed of assignment; and if notice of the *assignment had been given to the assurance office by the trustees, or cestuis que trust, the defendant could not have taken the steps to which he had resorted for the purpose of defeating his own grant. The omission of the trustees to give such notice cannot affect the interests of the cestuis que trust, and it is the interests of the infant cestuis que trust, which it is the main object of this suit to protect.

Mr. Rolfe, for the widow, disclaimed any desire on her part to obtain relief in this suit, to which she was an unwilling party. The defendant had been her greatest benefactor, and she was satisfied that whatever steps he had taken in this transaction had been taken with a view to her benefit, and the interests of her children.

[42]

Mr. Pemberton, and Mr. W. C. L. Keene, for the defendant Barnett [cited *Colman v. Sarrel* (2), which was the case of a voluntary assignment of stock by deed, and no actual transfer of the stock having been made, the Court refused to assist the volunteer]. What difference could there be between a sum of stock, and a sum of money secured by a bond or policy of assurance? An assignment of stock by deed, no actual transfer of the stock having been made, and an assignment of a policy of assurance by deed, the policy remaining in the hands of the grantor, stood upon exactly the same footing, where the assignee was a volunteer, and, in that character called upon the Court for its assistance. In both cases something remained to be done by

(1) 11 R. R. 173 (18 Ves. 140).

(2) 1 R. R. 83 (1 Ves. Jr. 50).

the grantor ; the gift was not complete, but executory, and the Court would not execute a voluntary covenant.

FORTESCUE
v.
BARNETT.

THE MASTER OF THE ROLLS :

In the case of a voluntary assignment of a bond, where the bond is not delivered, but kept in the possession of the assignor, this Court would undoubtedly, in the administration of the assets of the assignor, consider *the bond as a debt to the assignee. There is a plain distinction between an assignment of stock where the stock has not been transferred, and an assignment of a bond. In the former case the material act remains to be done by the grantor, and nothing is, in fact, done which will entitle the assignee to the aid of this Court until the stock is transferred ; whereas the Court will admit the assignee of the bond as a creditor.

[*43]

In the present case the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant if the trustees had given notice of the assignment to the assurance office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor which, to assist a volunteer, this Court would not compel him to do. I am of opinion that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment ; but their omission to give notice cannot affect the *cestuis que trust*. The defendant appears to have acted in this transaction with the purest intentions, but he has rendered himself amenable to the jurisdiction of this Court, and he must give security to the amount of the value of the policy assigned by the deed of settlement. The plaintiff is entitled to costs.

* * * * *

1894.
Jan. 21.

Rolls Court.
LEACH, M.R.

On Appeal.
Nov. 14, 15, 21.

Lord
BROUGHAM,
L.C.
[45]

ARMSTRONG v. ARMSTRONG.

LEWIS v. ARMSTRONG (1).

(3 Myl. & Keen, 45—68 ; S. C. 3 L. J. (N. S.) Ch. 101.)

An agreement for a secret partnership is a contravention of the laws made for regulating the business of a pawnbroker, and no legal partnership is thereby constituted.

By an indenture made the 24th day of June, 1810, between Samuel Shepheard Warner of the one part and Robert Armstrong, pawnbroker, of the other part, reciting that the said Samuel Shepheard Warner and Robert Armstrong had consented and agreed to become co-partners and joint traders in the trade or business of a pawnbroker, which Robert Armstrong then carried on in Baldwin's Gardens, it was witnessed that Samuel S. Warner and Robert Armstrong, in consideration of the good opinion they entertained of each other, and also in consideration of the sum of 2,000*l.* advanced by Samuel S. Warner to Robert Armstrong, did thereby mutually covenant, promise, and agree to and with each other to be and continue co-partners and joint traders in the trade or business of a pawnbroker, for and during the term of fourteen years, to commence from the day of the date thereof, determinable nevertheless as thereafter mentioned, and the same joint trade or business was to be managed and carried on in Baldwin's Gardens aforesaid in the house wherein Robert Armstrong then carried on the same, or in any other place or places that the said parties thereto might think prudent or advisable for that purpose; and it was thereby further agreed by and between the said parties thereto, that they should and would during the term and continuance of such co-partnership *keep such and so many books of account as should be proper and necessary for carrying on the said business, wherein from time to time should be fairly entered exact and true accounts of all their loans, buyings, sellings, receipts, and payments, with the circumstances of the dates, sums, and

[*46]

(1) This case was decided under 39 & 40 Geo. III. c. 99, since repealed and replaced by 35 & 36 Vict. c. 93, which by s. 13 requires that the names of all persons carrying

on the business of pawnbrokers shall be legibly printed over the door of the shop or place of business.—O. A. S.

parties, and of all their other transactions relating to the said trade or business, which book or books should remain with and be kept by Robert Armstrong in such safe and convenient place, and in such manner, that the said Samuel S. Warner should at all times have free liberty to inspect and examine the same, and take copies or extracts thereof; and it was thereby further agreed, that the said trade or business of a pawnbroker should be conducted and carried on by Robert Armstrong, who should be at liberty to employ such journeymen, servants, or apprentices as to him should seem necessary and expedient for conducting or carrying on the said trade or business of a pawnbroker; and it was further agreed, that the said parties thereto should once in every three months examine their books of accounts and join in making up the same, and balance, adjust, and settle the same accordingly, the first examination and adjustment to take place on Michaelmas Day next ensuing the date thereof, at which time Samuel S. Warner should receive and take the sum of 50*l.* out of the said co-partnership concern, as and for his share and proportion of the profits arising therefrom, and the like sum of 50*l.* at every subsequent adjustment and settlement which it was thereby agreed should take place quarterly during the continuance of the co-partnership; and it was thereby further mutually agreed, that in case either of the parties thereto should be minded and desirous of putting an end to and determining the co-partnership at the end of the first three, seven, or ten years of the said term of fourteen years, and should give twelve calendar months' notice or warning in writing to the other of *such his mind and intention, that then and in such case this co-partnership should cease and determine as if the whole term of fourteen years had been suffered to run out and expire; and further that, at the dissolution of the co-partnership, Samuel S. Warner should be at liberty to draw out of the co-partnership concern the said sum of 2,000*l.* so advanced by him; and it was further agreed by and between the parties thereto, that during the continuance of the co-partnership, it should not be lawful for the said Robert Armstrong to discount any promissory note or bill of exchange without the licence and consent of Samuel S. Warner first had and obtained,

ARMSTRONG
r.
ARMSTRONG.

[*47]

ARMSTRONG and in case Robert Armstrong should without such licence and
 ARMSTRONG. consent discount any such note or bill, he should forfeit and
 pay to Samuel S. Warner 100*l.* for every such note or bill so
 discounted ; and lastly, it was agreed, in case Samuel S. Warner
 should, at any time during the continuance of the co-partnership,
 advance a sum of money equal to that which the said Robert
 Armstrong might at that time have engaged in the said trade or
 business of a pawnbroker, that then and in such case he the
 said Samuel S. Warner should be entitled unto and receive an
 equal share and proportion of the profits arising therefrom, after
 deducting such a sum yearly, as an allowance to Robert Arm-
 strong for his trouble in the management of the said trade
 or business, as any two persons in the trade might think an
 adequate compensation for such management.

Warner advanced the sum of 2,000*l.*, and he afterwards from
 time to time between the years 1810 and 1816 made further
 advances by way of further capital, on which he received 10 per
 cent. as liquidated profits thereon ; and such further advances
 were regularly indorsed upon the indenture of June, 1810.
 The capital thus advanced by Warner, including the original
 [*48] 2,000*l.*, *amounted in the month of June, 1816, to 4,900*l.* and
 10 per cent. upon it had been regularly paid to him down to
 that time.

On the 28th of April, 1819, Robert Armstrong executed a
 deed, whereby, after reciting a lease to him of the premises in
 Baldwin's Gardens, at which the business was carried on, and
 that he was possessed of certain stock in trade and pledges and
 other property, he assigned the same to Thomas Wood and
 Samuel S. Warner, upon trust, among other things, after
 his decease, to permit and suffer his wife Betty Armstrong
 to take and have possession of the said premises, stock in trade,
 pledges, debts, &c., and all other property that the said Robert
 Armstrong might be possessed of, interested in, or entitled to at
 the time of his decease, to carry on in her own name the trade
 or business which Robert Armstrong then carried on, or should
 at the time of his death carry on in his said shop and premises
 during the continuance of the said lease, and so long as she
 should continue the widow of Robert Armstrong, and to receive

and take the profits of the said business for the support and maintenance of herself and such of the children, whether sons or daughters, under the age of twenty-one years, as might continue to live with her, and upon other trusts therein mentioned for the benefit of the children of Robert Armstrong. This instrument was never executed by the trustees, and was many years after proved as a testamentary paper, and administration with this testamentary paper annexed was granted to Betty Armstrong in the month of February, 1830.

ARMSTRONG
v.
ARMSTRONG.

Robert Armstrong died in the month of August, 1819, without having made any direct disposition of his property by will, leaving Betty Armstrong his widow, who *obtained administration of his estate and effects, and six children.

[*49]

Shortly after the death of Robert Armstrong, the stock in trade was taken by various persons, when Warner and Wood were present, but declined to assist in such stock-taking, alleging that they were interested in the stock as trustees under the instrument of the 10th of April, 1819; and Warner did, as such trustee, on the 1st of February, 1820, receive from Messrs. Nixon & Co., at whose banking-house Robert Armstrong kept cash, the sum of 11s. 6d., being the balance due, upon the banking account, to Robert Armstrong's estate.

The widow continued to carry on the testator's business of a pawnbroker, paying at first to Warner the same 10 per cent. on his advances as the testator had done; but the percentage was afterwards reduced by Warner to 8 per cent., and in the year 1822 to 5 per cent. From the time of the execution of the deed of June, 1810, to the death of Robert Armstrong, the business was carried on in Armstrong's name alone, and the licence required by the Act was obtained by Armstrong alone. In like manner after the death of Robert Armstrong, the business was carried on in the sole name of the widow, and her name alone was used in the licence; and Warner never in any manner interfered as partner or proprietor in the conduct of the business, but he did occasionally during the lifetime of Robert Armstrong, and afterwards, assist in taking the annual account of stock of goods and pledges upon the premises, such assistance being in the pawnbroking business usually afforded by pawnbrokers and other

ARMSTRONG persons not interested in the particular stock taken. On one of
 those occasions he signed a memorandum in the following form :
 ARMSTRONG. " The *above sum formed part of the stock of Mr. Armstrong as
 [*50] taken by us this 30th day of June, 1811.—S. S. WARNER, W. G.
 PERRYMAN."

The original bill was filed in November, 1828, by the children of Robert Armstrong against his widow, and against Thomas Wood and Samuel Shephard Warner as trustees of the instrument of the 28th of April, 1819; and it prayed the usual accounts, and that the plaintiffs might be declared to be entitled to the benefits which they claimed under that instrument. Warner put in an answer, by which he denied that he had ever accepted the trusts of the instrument to the benefit of which the plaintiffs claimed to be entitled; stated the deed of the 24th of June, 1810, the advance of the sum of 2,000*l.*, and subsequent advances amounting to 4,300*l.*, and claimed to be interested in the estate of Robert Armstrong as surviving partner; and he filed a cross-bill, making statements to the same effect, and praying for an account of the alleged partnership effects, and that his rights as surviving co-partner under the deed of the 24th of June, 1810, might be ascertained.

Warner died in the month of May, 1829, having made a will, dated the 30th of April, 1827, which contained the following recital: " Whereas Betty Armstrong, relict of Robert Armstrong, is and stands justly and truly indebted to me in the sum of 7,000*l.* and upwards for principal money and interest, the principal whereof has been from time to time advanced by me to her for the purpose of enabling her to carry on the business of a pawnbroker; and inasmuch as I am apprehensive that the calling in of so large a sum of money altogether at my decease would be very injurious to her in her aforesaid business, it is therefore my earnest wish, and my will and desire, and I declare, order, and direct, that *my trustees and executors for the time being do and shall, within three months after my decease, adjust and balance my account with the said Betty Armstrong, and thereupon take an account of the stock on the premises of the said Betty Armstrong, and do from time to time continue to take an account of such stock, when and so often as they may deem it

[*51]

necessary; and if satisfied, on such stock-taking, that there is and continues a good and sufficient security for the sum or balance due, do and shall allow the said sum of 7,000*l.*, or such other sum as may be found due at the time of my decease, to remain at interest at 5 per cent.”

ARMSTRONG
v.
ARMSTRONG.

The original bill, filed by the children of Robert Armstrong, was revived against Lewis and others, Warner's representatives, who also revived the cross-suit instituted by Warner.

The two causes were heard together in May, 1831; and at the hearing it was insisted, on the part of the plaintiffs in the original bill, that the deed of the 24th of June, 1810, was not intended to constitute a *bonâ fide* partnership, but was merely colourable, in order to enable Warner to receive 10 per cent. upon his loans to Robert Armstrong; and further, that by the several Acts of Parliament passed for regulating the business of a pawnbroker, and which were to be considered as passed for the protection of the public, there could be no dormant and secret partnership in that business. Much evidence was given in the two causes; and the MASTER OF THE ROLLS directed the two following issues to the Court of Exchequer, in which the plaintiffs in the cross-suit were to be the plaintiffs, and the plaintiffs in the original suit the defendants; first, whether at the death of Robert Armstrong, Samuel Shephard Warner was legally to be considered as a partner of the said Robert Armstrong, *and entitled to receive payment at the rate of 10 per cent. upon the capital advanced by him out of the profits or effects of the concern; and, secondly, if he was to be considered as such partner, and entitled to receive such payment as aforesaid, then whether he was entitled to receive such payment on a sum of 4,300*l.*

[*52]

Upon the trial of these issues the jury, under the direction of Lord Chief Baron LYNCHURST, found for the plaintiffs at law on both issues.

[This decision was affirmed upon appeal to the Exchequer Chamber as reported in 2 Crompton & Meeson, 284, on the ground that it did not appear, in point of fact, that any contract was made between the parties to carry on the partnership in such a manner as to contravene the Acts of Parliament; but at the

ARMSTRONG same time Lord DENMAN, Ch. J. stated that it was] the general
r.
 ARMSTRONG. opinion of the whole Court, that if there was an agreement
 [53] proved to carry on the partnership in violation of those Acts of
 Parliament, that agreement would be void, and would confer no
 rights on either party as against the other.

Jan. 21. The two causes now came on to be heard before the MASTER
 OF THE ROLLS for further directions [who said :]

[62] I am of opinion that, upon the whole evidence in the cause,
 it is clear that there existed an understanding and agreement
 between the parties at the time of the execution of the deed of
 June, 1810, and that Warner, if a partner at all, was intended
 to be a secret partner ; and I entirely concur in the opinion
 delivered in the Exchequer Chamber that, assuming such fact,
 no legal partnership was constituted between Armstrong and
 Warner.

The cross-bill must therefore be dismissed, and, the claim of
 Warner not being founded *bonâ fide*, must be dismissed with
 costs.

* * * * *

Nov. 14, 15. The representatives of Warner presented a petition of
 rehearing, and the case was again fully argued before the
 [63] Lord Chancellor by *Mr. Knight, Mr. Tinney, and Mr. Wakefield*,
 for the appellants ; and by *Sir Edward Sugden, Mr. Lovat, and*
Mr. Cooper, in support of the decision of the MASTER OF THE
 ROLLS. * * *

Nov. 21. THE LORD CHANCELLOR [affirmed the decree, saying :]

[64] If a person agrees with another to be a secret partner in the
 business of a pawnbroker, he agrees to do that which is illegal
 and punishable by the 39 & 40 Geo. III. c. 99, an Act containing
 provisions highly beneficial, and bringing the trade in question
 under regulations which are wholesome to the community,
 inasmuch as they prevent the abuse of such traffic ; regulations
 which will never be objected to by the respectable part of the
 body concerned in carrying the trade on, and which only affect
 those whom the police ought to watch over. Any agreement of
 this sort, therefore, is unlawful ; can convey no rights in any

Court to either party, and will not be enforced by decisions at law or by decree here in favour of one against the other of persons equally culpable. ARMSTRONG
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If, as in the present instance, we have before us a contract of partnership wholly silent upon the statutory obligation to make the names public over the door, we have no right to argue from the omission that an infraction of the law was intended ; on the contrary, we are rather bound to believe that the compliance with the law, being taken for granted as a matter of course, was not expressly mentioned in the articles, as being thought superfluous.

If, again, such a contract, legal in itself, has been made, nothing done afterwards, how illegal soever, can operate to make the contract unlawful. But where *the acting of the parties is illegal ; where, the contract being silent, the law is broken under it, though not by force of it, there arises a very natural suspicion that the written articles, though true as far as they go, do not contain the whole truth, and that another agreement was entered into, collateral to the one in writing, and to which the illegal acting may be referred. [*65]

Then, if such an agreement shall appear from all the circumstances plainly to have subsisted, the inference is irresistible, that the two, the written and the unwritten, must be taken together in order to get at what the true contract between the parties was. For this is not the case of two independent contracts between the same parties touching the same thing. The nature of the transaction prescribes silence as to some parts of it which will not bear the light, while the innocent and producible portion is reduced to writing. Hence the two must be taken as one contract, the production of one and suppression of the other portion being easily explained.

Although it is vain to deny that there have been somewhat unusual proceedings in certain parts of the present cause, and though considerable error appears to have prevailed in several stages of the proceedings, including those at *Nisi Prius*, yet taking the mere facts into consideration, it would be difficult to figure a case which leaves less room for doubt. No man can so far abstract himself from his common feelings, so far shut

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[*66]

his eyes to the plainest indications of common sense, as to hesitate one instant in what light he shall regard the transaction between Messrs. Armstrong and Warner. To call it a partnership at all is incorrect, indeed is an abuse of terms. It was a loan transaction much rather than a partnership; but to escape the usury laws, and obtain relief here, the *party must treat it as partnership. Money is advanced, large interest is stipulated for under the name of share of profits, but a share fixed at not under 10 per cent., and the party advancing the money treats his partnership deed exactly as a security for the loan both in transactions *inter vivos*, and when he comes to make his will. Then the ostensible party deals with the house, lease, insurer's right to policy money in case of fire, and, in short, the whole business as his own, and as a concern in which the other never interferes. But take it as a partnership, the whole of these dealings, and a variety of other circumstances, shew that Warner was a concealed partner purposely, and not from any accidental omission to comply with the statutory requisition in respect to making his name public on the premises. Of these circumstances, his attending with other friends and pawnbrokers at the periodical stock-takings, and on one occasion actually signing with others the account of Armstrong's stock in trade, is perhaps the most remarkable. * * *

[67]

To the facts in this case I cannot shut my eyes, nor can I avoid the conclusions to which I know as certainly that any jury must come, to whom they might be submitted by an issue, as I know that I sit here. A secret understanding, amounting to a collateral agreement, subsisted between the parties, in execution of which it was that Warner was, if a partner at all, a dormant or secret partner, nay, a partner concealed, and not merely dormant; carefully, designedly, craftily concealed, breaking the statutory provisions, not so much by non-feasance or mere omission, as by a course of cunning contrivance. The existence of both agreements, the open and the secret, is clear, and they were parts of one contract, wholly illegal.

* * * * *

CHILD v. GIBLETT (1).

(3 Myl. & Keen, 71—76; 3 L. J. (N. S.) Ch. 124.)

1884.

Jan. 15.

Rolls Court.
LEACH, M.R.

[71]

A bequest of residue to the testator's daughters A. and B. in equal proportions; and in case of the death of either, the whole to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years; but if not, then among the children of C.

A. and B. survived the testator; and A., who died without having been married, bequeathed the whole of her property to B.: Held, that the bequest did not become absolutely vested in A. and B. on the death of the testator but continued subject to the executory bequest over in favour of C.

THE residuary clause of the will of John Child was in the following words: "I give and bequeath my household furniture, plate, linen, china, and wearing apparel, and all other the residue of my estate and effects, to Paul Giblett and Benjamin Brecknell, upon trust, in the first place, to pay all my just debts, and after payment thereof, to divide the same between my two daughters Selina Child and Elizabeth Child, share and share alike, to whom I give and bequeath the same in equal proportions; and in case of the death of either, I give the whole thereof to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they shall attain the age of twenty-one years; but if not, then among the children of Paul Giblett, share and share alike, and if only one child, then the whole thereof to that one child." And the testator appointed Paul Giblett and Benjamin Brecknell executors of his will.

The testator died in the year 1808, leaving the two daughters mentioned in the will (who had then both attained the age of twenty-one) surviving him. Elizabeth Child died on the 28th of November, 1824, without having been married, and having made a will, by which she gave the whole of her property to the plaintiff, Selina Child, whom she appointed her sole executrix. The plaintiff proved the will of her deceased sister; and the present bill was filed by her against the surviving executor and *the representatives of Brecknell, the deceased executor, and against

[*72]

(1) *In re Hayward* (1882) 19 Ch. D. 470, 51 L. J. Ch. 513, 45 L. T. 790.

CHILD
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GIBLETT.

the children of Paul Giblett; and the question was, whether the plaintiff was entitled to an absolute interest in the residuary property of the testator, or only to an interest for life under the testator's will.

[73] *Mr. Bickersteth* and *Mr. Kindersley*, for the plaintiff [cited *Cambridge v. Rous* (1) and the earlier cases there mentioned, and subsequent cases which followed that case]. If one of the daughters die in the testator's lifetime without children, then the whole is to vest absolutely in the surviving daughter at the testator's decease; but if they or either of them die in his lifetime, leaving children, then the property is to go to such children if they attain twenty-one; and it is only in the event of such children not attaining twenty-one that the bequest over to the children of Paul Giblett is to take effect. * * *

[74] *Mr. Stuart*, for the children of Paul Giblett [cited *Lord Douglas v. Chalmer* (2), *Billings v. Sandom* (3), and *Nowlan v. Nelligan* (4)]. In this case there can be no doubt of the intention of the testator; he clearly intended to provide for the children of his daughters if they should have any,—whether in his lifetime, or at any subsequent period, is perfectly immaterial,—and to give such children an absolute interest in his residuary property. It is equally clear, that the testator intended to make the children of Paul Giblett the ultimate objects of his bounty, if his daughters should have no children that should attain twenty-one, or, which is the same thing, if they should die without having been married; for in either case the condition upon which the executory bequest is to take effect is equally answered: *Jones v. Westcomb* (5), *Murray v. Jones* (6). These dispositions [*75] of the testator's residuary property in favour of grandchildren, and ultimately in favour of the children of Paul Giblett, are inconsistent with the intention of giving more than a life interest to his daughters.

(1) 6 R. R. 199 (8 Ves. 12).

(2) 5 R. R. 175, n. (2 Ves. Jr. 501).

(3) 1 Br. C. C. 393.

(4) 1 Br. C. C. 489.

(5) Pr. in Ch. 316.

(6) 13 R. R. 104 (2 V. & B. 313).

Mr. Bickersteth, in reply :

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* * In *Lord Douglas v. Chalmer* the construction put by Lord ALVANLEY upon the words “in case of her decease” was inconsistent with the current of authorities.

THE MASTER OF THE ROLLS :

The rule is that, where there is a bequest to two persons, and, in case of the death of one of them, to the survivor, the words “in case of the death” are to be restricted to the life of the testator; but the question is, whether the first expression used by this testator, to which this rule would apply, is not qualified by the subsequent words of the will. The testator cannot possibly have intended that the children of Paul Giblett should take in the event of a marriage of his daughters, and their death without children in his lifetime, and *that they should not take in the event of a marriage of his daughters and their dying without children after his decease. That would not be a rational distinction. I am of opinion, therefore, that the general rule is here qualified by the subsequent words used by the testator; and that in the event of the plaintiff dying without children, or if she should have children, and none of them live to attain the age of twenty-one, the children of Paul Giblett will be entitled to the residuary property of the testator.

[*76]

CLIFTON v. COCKBURN.

(3 Myl. & Keen, 76—103.)

1894.
Feb. 26, 28.
March 1, 8.

Where the persons interested under a settlement have adopted and acted for many years upon a particular construction of a doubtful clause, their acquiescence and subsequent arrangements upon the footing of that construction may amount to a compromise which will be supported as a family arrangement.

LORD
BROUGHAM,
L.C.

[76]

[The following note of this appeal is merely inserted here in order to retain certain general observations of the LORD CHANCELLOR upon the question whether money paid under a mistake of law can ever be recovered in equity (1).]

(1) On this point see *Rogers v. Ingham* (1875) 3 Ch. D. 351, 35 L. T. 677, where some instances of this intervention of equity are explained as exceptional.—O. A. S.

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[99]

THE LORD CHANCELLOR upon this point said :]

I do not feel it necessary to argue, upon the present question, the distinction between payment made in error of law and in error of fact. The distinction, it may be observed, is somewhat more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one; and I think I could, without much difficulty, put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule, and refuse to relieve against an error of law.

At any rate there can be no reason to find fault with the cases where equity has relieved, notwithstanding the distinction; for in truth they lie on the very border of the two kinds of error, and are rather to be classed among instances of error in fact than in law, even where there are no circumstances of circumvention or fraud, as there clearly were in some of them. Thus *Pusey v. Desbouverie* (1), was a release to her brother, by a sister of her orphanage part according to the custom of London, for a fourth of its value; and it was strongly argued that she had not been informed of the amount she was giving up. *Broderick v. Broderick* (2) was a case of plain fraud; a release by an heir-at-law to a devisee of all his rights for 100 guineas, on a recital that a will had been duly attested when it was not, the Court expressly deciding on the ground of *suppressio veri* *from the heir, and *suggestio falsi* in the recital. *Cocking v. Pratt* (3) was a mixed case of influence and mistake; the influence being that of which this Court is peculiarly jealous, where a parent takes advantage of a child just come of age. *Ramsden v. Hylton* (4) consisted much rather of mistake or ignorance of material fact than error in law; and *Bingham v. Bingham* (5) was a case of certainly a very startling nature; for a person had sold another an estate which, in truth, belonged to the purchaser.

But the present case does not call for any such argument. It

(1) 3 P. Wms. 315.

(2) 1 P. Wms. 239.

(3) 1 Ves. Sen. 400.

(4) 2 Ves. Sen. 305.

(5) 1 Ves. Sen. 126.

is to be regarded as an acting for a long course of years upon a given construction of a clause in a settlement, the clause admitting of two interpretations, and far from absolutely clear and certain in its import; the party putting the construction being the maker of the settlement, the other parties the members of the settlor's family; the transactions in the course of which the construction was acted upon being domestic arrangements entirely. It is unnecessary to cite authorities to shew how strongly the Court always leans in support of family arrangements, and how reluctantly it will disturb them. Nor is it necessary to go so far as was done in *Cory v. Cory* (1), where a compromise made under the influence of intoxication was supported by Lord HARDWICKE, as tending to settle family differences; or in the older cases, where parental influence, directly exerted, was held insufficient to set aside what was done under such pressure. The more moderate view of the subject, taken in later instances, such as *Stockley v. Stockley* (2), is enough to bear out *the only proposition I have any occasion here to maintain, that a construction far from being plainly and grossly erroneous, imposed upon a clause in a family settlement, ought not, if acted on by the makers of that settlement, to be disturbed by this Court after their decease.

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v.
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[101]

* * * * *

LORD PORTARLINGTON v. SOULBY.

(3 Myl. & Keen, 104—109; S. C. 4 L. J. (N. S.) Ch. 241.)

An injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt, under the circumstances continued.

Jurisdiction of the Court of Chancery to stay the proceedings of parties in foreign Courts.

1834.
March 24.
April 15.

Lord
BROUGHAM,
L.C.

[104]

MR. ROLFE moved that an injunction granted by the VICE-CHANCELLOR, whereby the defendants were restrained from suing in Ireland upon the bill of exchange in the pleadings mentioned, might be dissolved.

(1) 1 Ves. Sen. 19.

(2) 12 R. R. 184 (1 V. & B. 23).

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The *Solicitor-General* (Sir C. Pepys) and Mr. Bagshawe, for the plaintiff, opposed the motion.

The grounds on which the application was supported, on the one side, and resisted, on the other, are fully stated in the judgment.

April 15. THE LORD CHANCELLOR:

This was a motion to dissolve an injunction, granted to restrain the defendants from suing in Ireland upon a bill of exchange for 1,000*l.* accepted by the plaintiff, payable to a person of the name of Aldridge, by whom it was indorsed and passed away to Mr. Brook, a retail dealer in wines, and by him to the defendants.

The ground of the injunction is, that the bill was given by Lord Portarlington for money lost at play.

Messrs. Soulby are respectable wine merchants, who had previously had dealings with Mr. Brook. In 1831 Mr. Brook, having occasion for a loan of money, applied to them, and proposed to them to discount the bill in question, and Messrs. [*105] Soulby thereupon advanced him *700*l.*, Brook agreeing to take 300*l.* worth of wine to make up the residue, and at the same time giving his own acceptance for the sum so advanced. The wine never was delivered, except to the value of about 38*l.*

Now upon this part of the transaction it may be remarked, that a party obtaining the loan of money, and not merely giving a security for repayment of the sum advanced to him, but giving another security to the amount of nearly half as much more, and then taking goods and not money to that whole amount, especially when he does not put his own name on the back of the bill, affords, *primâ facie*, a proof of his embarrassment—of the person so raising money being put to shifts, and even of his having some knowledge, which he withholds, of the origin of the security. This ought to excite suspicion, and to cause inquiry; nor can any one doubt that Messrs. Soulby, as prudent men, must have questioned Mr. Brook as to how he came into possession of the bill bearing Lord Portarlington's name upon it.

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But although there is sufficient ground for holding that the bill was taken in circumstances which were calculated to raise suspicion, and ought to have occasioned inquiry, still there is no necessity for proving such a case, much less for shewing that the defendants knew of the illegal consideration, in order to sustain the injunction. The fact of the illegality of the consideration is distinctly alleged, with the circumstances of the gambling transaction; and to this allegation, supported by the plaintiff's oath, no contradiction whatever is given in the answer; nor do the defendants, who rely on their affidavit, as the answer has been excepted to and the exceptions allowed, aver anything but their own ignorance, and their belief of their father's ignorance of the origin of the bill; and they produce no affidavit at all from Brook, a circumstance of itself nearly decisive, both that the case made by the bill is true, and that Brook was aware of the fact. Nothing else can account for his not joining in an affidavit to answer that of the plaintiff, his interest being clearly identical with Messrs. Soulby's. It is further to be observed, that the defendants shew by their affidavit that they have been in correspondence with Aldridge, and yet they do not swear that they are now ignorant of the illegal consideration, or of Aldridge keeping a gaming-house, but only that they knew it not in the year 1831, when they took the bill.

[*106]

The case, therefore, is reduced to this. An illegal consideration distinctly stated, and not denied, with several circumstances leading to the belief, that the defendants now know such to have been the origin of the bill; and several circumstances also shewing that it was taken by their late partner under suspicion, and yet without inquiry.

It is, then, impossible to doubt that the injunction was well granted, and the whole question would be free from difficulty but for one peculiarity in the case: the action is brought in Ireland, and the interposition of this Court is sought to stop proceedings there. That this is an unusual proceeding must be admitted, but I do not see any ground for questioning the competency of it.

Soon after the Restoration, and when this like every other branch of the Court's jurisdiction was, if not in its infancy, at

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least far from that maturity which it attained under the illustrious series of Chancellors, the Nottinghams and Macclesfields, the parents of equity, the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported *shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of *Love v. Baker* (1). In *Love v. Baker* it appears, that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction here, and the Court allowed the *subpoena* to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord CLARENDON refused the injunction to restrain those proceedings at Leghorn, after advising with the other Judges; but the report adds, "*sed quære*, for all the Bar was of another opinion;" and it is said that, when the argument against issuing it was used, that this Court had no authority to bind a foreign Court, the answer was given, that the injunction was not directed to the foreign Court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a Court within this country, which no order of this Court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding.

Accordingly this case of *Love v. Baker* has not been recognized or followed in later times. Two instances are mentioned in Mr. Hargrave's collection of the jurisdiction being recognized; and in the case of *Wharton v. May* (2), which underwent so much discussion, part of the decree was to restrain the defendants from entering up any judgment, or carrying on any action, in what is called "the Court of Great Session in Scotland," meaning, of course, the Court of Session.

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I have directed a search to be made for precedents in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is

(1) 2 Freem. 125; 1 Ch. Ca. 67.

(2) 5 Ves. 27, 7, where the jurisdiction does not appear to have been questioned. See also *Bushby v. Munday*, 21 B. R. 294 (5 Madd. 297);

Harrison v. Gurney, 22 B. R. 211 (2 J. & W. 563); *Beauchamp v. Marquis of Huntley*, 23 B. R. 143 (Jac. 546).—O. A. S.

the case of *Campbell v. Houlditch* in 1820, where Lord ELDON ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the Court of Session in Scotland. From the note which his Lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority.

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In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the Court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the Court. If the Court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if, for instance, as in *Penn v. Lord Baltimore* (1), it can decree the performance of an agreement touching the boundary of a province in North America; or, as in the case of *Toller v. Carteret* (2), can foreclose a mortgage in the isle of Sark, one of the Channel Islands; in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign Court. * * *

I am, therefore, of opinion that this injunction was well issued, and that it must be continued, and that this motion must be refused with costs.

[109]

JOSLIN v. HAMMOND.

(3 Myl. & Keen, 110—112; S. C. 3 L. J. (N. S.) Ch. 148.)

A testator gave his whole property to his wife, upon condition that she should pay an annuity of 130*l.* to his mother during her life; after the death of his wife the whole to be equally divided between those of his children who should survive her, share and share alike. All the testator's children died in the lifetime of his widow, who married again,

1834.
Jan. 30.

Rolls Court.
LEACH, M.R.

[110]

(1) 1 Ves. Sen. 444.

(2) 2 Vern. 494.

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and died leaving her husband surviving her: Held, upon her death, that in the events which had happened the testator's property was undisposed of, and that the next of kin, and not the second husband in right of his wife, were entitled to it.

THE will of the testator, John Brooks, as far as related to the question in the cause, was in the following words: "I give and bequeath to my dear wife, Mary Ann Brooks (whom I appoint my executrix), the whole of my property wherever it may be invested, or in whatever channels it may lie, on condition of paying my dear mother, Sarah Brooks, 180*l.* per annum during her, the aforesaid Sarah Brooks's, life. At the death of my dear wife, Mary Ann Brooks, the whole of the property to be equally divided among those of my children who may survive her, share and share alike. I do likewise particularly desire that the whole of the property may be laid out legally in mortgages on land, and may so remain. Should my afore-named dear wife marry again, each of my children on arriving at the age of twenty-four shall be paid 400*l.* Should she not marry again, I leave them implicitly to her kind and indulgent care." And the testator appointed his wife, Ann Brooks, David Robinson, and Thomas Ridley, executors of his will.

The testator died in the year 1812, leaving his widow, Mary Ann Brooks, and one child, Mary Ann, surviving him; and his will was proved by the executors named therein. A posthumous child, Edward Brooks, was afterwards born, who died in early infancy, leaving his mother and sister his next of kin.

[*111] Mary Ann Brooks, the younger, intermarried with the plaintiff, Henry Joslin, and died in the year 1831, under *the age of twenty-four, in the lifetime of her mother, without issue.

The testator's widow intermarried with the defendant, William Hammond, and died in the year 1832, and the testator's mother died in the year 1829.

The question in the cause was, whether the defendant Hammond was, in right of his deceased wife, entitled absolutely to the whole property of the testator, or whether the testator, in the events which had happened, was to be considered as having died intestate.

Mr. Bickersteth, Mr. Pemberton, and Mr. Torriano, for the representative of the deceased children of the testator, argued that

upon the whole context of the will it was clearly the intention of the testator to confine his wife's interest to an interest for life; and that as he had made no provision for the contingency of the children dying in her lifetime, there was an intestacy in the events which had happened, and the testator's property was consequently divisible in equal third parts between the representatives of the testator's two children and widow respectively.

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Mr. Treslove and Mr. Martin, for the defendant Hammond:

This testator gives, in the first instance, to his wife the whole of his property, wheresoever it may be invested, and in whatever channels it may lie, subject to the payment of an annuity of 190*l.* a year to his mother. There can be no doubt that if the will had stopped there, the wife would have taken an absolute interest subject to the annuity. But that interest is subsequently cut down to an interest for life in certain *contingencies which have not happened. The absolute interest, therefore, remains, and the defendant Hammond, in right of his wife, is entitled to it. In *Sturges v. Pearson* (1), where there was a gift to all the children, or such of them as should be living at the wife's death, and all the children died in the lifetime of the mother, the Court held that as the gift to all the children was, by the alternative form of the expression, defeated upon the contingency of there being some of the children living at the mother's death, and that contingency did not happen, the primary expression giving vested interests to the children took effect. *Smither v. Willock* (2) was determined upon a similar principle.

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THE MASTER OF THE ROLLS :

It appears to me that, upon the whole context of this will, it was the intention of the testator that in no event the wife should have other than a life estate. If at her death a child or children survived her, they were to take the property between them; but he has not provided for the case of all the children dying during the life of his wife, and that event having happened, he has so far died intestate. It is not a probable intention to be imputed

(1) 20 B. R. 316 (4 Madd. 411). followed *Harrison v. Foreman*, 5
(2) 9 Ves. 233. A case which R. R. 28 (5 Ves. 207).—O. A. S.

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to the testator that, if his children died in the lifetime of his wife leaving families, his widow on her second marriage should enjoy the whole property.

HUNTER v. ATKINS (1).

(3 Myl. & Keen, 113—158; S. C. Coop. t. Brough. 464.)

1832.
July 22, 23.

Rolls Court.
LEACH, M.R.

On Appeal.

1834.
Feb. 11, 12,
13, 14, 24.

Lord
BROUGHAM,
L.C.

[113]

A gift by deed, subject to a power of appointment by the donor, from a person upwards of ninety years of age to a confidential agent, who had for many years been in habits of friendship with the donor, without the intervention of a disinterested third person, the solicitor who drew the deed being the solicitor of the person who took the benefit under it, declared void at the Rolls; but supported, under all the circumstances, upon appeal.

THE bill was filed by Elizabeth Hunter, the widow and administratrix, with the will annexed, of Admiral Lauchlan Hunter, deceased, against John Atkins, John Pelly Atkins, and John Roberts, for the purpose of setting aside a deed which, it was alleged, the defendants had fraudulently procured to be executed by the late Admiral Hunter. * * *

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The bill stated, that for many years previous to the year 1811, Admiral Hunter had employed the defendant, John Atkins, as his agent and banker; and that John Atkins having in the year 1811 taken his son, John Pelly Atkins, into partnership with him, Admiral Hunter employed the defendants, John Atkins and John Pelly Atkins, as his agents and bankers, from the date of such partnership to the time of his death.

[The further facts of the case are concisely but sufficiently stated in the following passage from the judgment of the MASTER OF THE ROLLS:]

July 23.

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It appears to me, upon the whole evidence in the cause, that Admiral Hunter, who, at the time he executed *the deed in question was about the age of ninety-two years, had, to a considerable extent, a disposing power of mind; that he was equal to the common purposes of life, and capable of rational conversation upon ordinary matters, but that he was not competent to nor capable of fully understanding matters of business. On the 27th of June, 1823, an account is stated to have been settled between Admiral Hunter and Mr. Alderman Atkins (2), by which it

(1) *Liles v. Terry*, C. A., 195, 2 Q. B. (2) *I.e.*, John Atkins.
679, 65 L. J. Q. B. 34, 73 L. T. 428.

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appeared that a sum exceeding 1,000*l.* was due on balance to the admiral. On the day following a part of this balance was invested by Mr. Alderman Atkins in the purchase of a sum of 900*l.* new 4 per cent. Bank Annuities, in the joint names of himself, his son, and the admiral. On the 10th of July following, the admiral's family left London; but the admiral remained in London, alleging that he had a matter of business to transact with Mr. Alderman Atkins, and on the same day he called upon the alderman with a view to this matter of business, and was referred by him to the defendant Mr. Roberts, who had for some years been employed by the alderman as his attorney. On the same day Mr. Roberts, by the instructions of the admiral, prepared the deed in question, being a declaration that the 900*l.* stock was held in trust for such purposes as the admiral should by writing appoint, and in default of appointment upon trust to permit the admiral to receive the dividends during his life; and after his death to raise, by sale of a sufficient part of the stock, a sum of 180*l.* to be paid to two persons named in the deed; and as to the residue of the stock, upon trust for the benefit of Mr. Alderman Atkins, his executors, administrators, and assigns.

The admiral lived till the year 1830, but never executed his power of appointment as to the stock; and the stock, subject to the payment of 180*l.*, is now *claimed by Mr. Alderman Atkins. [*129] At the same time with this deed, Mr. Roberts prepared a will for the admiral, by which the rest of his property, amounting, as it is said, to about 1,400*l.*, was given to his wife and her niece, whom he had received and educated as his child. Both these instruments were executed on the next day by the admiral, and the deed was, at the same time, executed by the alderman and his son. It is not in evidence that the alderman had any communication with Mr. Roberts respecting the preparation of these instruments before Mr. Roberts saw the admiral; but it is established that, after the preparation of the drafts of the instruments, and before their execution, there had been a communication between the alderman and Mr. Roberts upon the subject of their contents (1).

(1) On the appeal the LORD before him of any such communication having been made.—O. A. S. CHANCELLOR observed (3 Myl. & K. 155), that there was no evidence

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That the admiral had, a few days afterwards, a very imperfect notion of the effect of the instruments which he had thus executed, is evident from a letter (1) which he wrote to the alderman on the 16th of July from Bury, where he was on his journey homeward; and the observation which has been pressed upon the Court, that the alderman did not immediately fully explain the subject to him, is not without weight.

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It is evident that the wife and niece were ignorant not only of the transaction, but of the fact that the admiral possessed the property with which the stock was purchased; and the circumstance that the dividends of this stock were not entered in the pass-book with the other monies received by the alderman for the use of the admiral, justifies the inference which has been drawn from it at the Bar, that there was an intention to keep the wife and niece in ignorance on the subject. That the alderman had been for many years the most confidential *friend of the admiral, and had great influence over his mind, is out of all doubt; and upon the whole case, without coming to any conclusion upon the point whether the deed was the effect of influence upon the admiral, or was the spontaneous act of the admiral's own mind, I am of opinion that, considering the age and imbecility of the admiral, and the relation in which Mr. Alderman Atkins stood to him, no gift from Admiral Hunter to Mr. Alderman Atkins could be maintained in a court of equity, unless more protection had been thrown around the admiral than appears in this case. * * *

1834.
Feb. 11, 12,
13, 14.

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The defendants J. Atkins and J. P. Atkins presented a petition of re-hearing to the Lord Chancellor.

Sir Edward Sugden and Mr. Sharpe, in support of the decree.

Mr. Pepys, Mr. Beames, and Mr. Rennalls, for the appellants.

[The principal cases cited were *Pratt v. Barker* (2), *Huguenin v. Baseley* (3), *Harris v. Tremenheere* (4), and *Nicol v. Vaughan* (5).

(1) This letter is not set out in the original report, but the purport and explanation are stated in the judgment of the Lord Chancellor, see *post*, p. 38.—O. A. S.

(2) 27 R. R. 136 (4 Russ. 507).

(3) 9 R. R. 276 (14 Ves. 273).

(4) 10 R. R. 5 (15 Ves. 34).

(5) 35 R. R. pp. 60, 67 (1 Cl. & Fin. 49).

THE LORD CHANCELLOR in the course of his judgment said :]

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Feb. 24.

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Unless the circumstances of the transaction are such as make it void upon the ground of fraud or undue influence, the right of the admiral to select the objects of his bounty, and of the alderman to receive his share of it, is incontrovertible, and the Court cannot interfere. The various departments of its jurisdiction are not in any portion accurately defined; all the lines within its province are not precisely drawn; but at least its outer boundary is sufficiently marked, and separates it plainly enough from the province of the moralist,—from the regions under the sway of what are not very accurately termed the duties of imperfect obligation.

There is no dispute upon the rules which, generally speaking, regulate cases of this description. Mr. Alderman Atkins is either to be regarded in the light of an agent confidentially intrusted with the management of Admiral Hunter's concerns—a person at least in whom he reposed a very special confidence, or he is not. If he is not to be so regarded, then a deed of gift, or other disposition of property in his favour, must stand good, unless some direct fraud were practised upon the maker of it; unless some fraud, either by misrepresentation or by suppression of facts, misled him, or he was of unsound mind when the deed was made. If the alderman did stand in a confidential relation towards him, then the party seeking to set aside the deed may not *be called upon to shew direct fraud, but he must satisfy the Court by the circumstances that some advantage was taken of the confidential relation in which the alderman stood. If the alderman stood towards the admiral in any of the known relations of guardian and ward, attorney and client, trustee and cestui que trust, &c., then, in order to support the deed he ought to shew that no such advantage was taken, that all was fair, that he received the bounty freely and knowingly on the giver's part, and as a stranger might have done. For I take the rule to be this; there are certain relations known to the law, as attorney, guardian, trustee; if a person, standing in these relations to client, ward, or cestui que trust, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party,

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the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing every thing to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or, without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilised men, men who have the benefits of civility without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of *mature age and of sound mind, and there be nothing to shew that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas, in the case of a stranger, it would lie on those who opposed him) to shew that he has placed himself in the position of a stranger, that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened, which might not have happened, had no such connection subsisted. The authorities mean nothing else than this, when they say, as in *Gibson v. Jeyes* (1), that attorney and client, trustee and cestui que trust may deal, but that it must be at arms' length, the parties putting themselves in the situation of purchasers and vendors, and performing (as the Court said, and, I take leave to observe, not very felicitously or even very correctly) all the duties of those characters. The authorities mean no more, taken fairly and candidly towards the

(1) 5 R. R. at p. 304 (6 Ves. 277).

Court, when they say, as in *Wright v. Proud* (1), that an attorney shall not take a gift from his client, while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature; a *dictum* reduced in *Hatch v. Hatch* (2) to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of shewing that every thing was voluntary and fair, and with full warning and perfect knowledge; for in *Harris v. Tremenheere* (3) the COURT only held that in such a case a suspicion attaches on the transaction, and calls for minute examination.

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[After referring at some length to the cases which had been cited, his Lordship said:]

The rule, I think, cannot be laid down much more precisely than I have stated it; that where the known and defined relation of attorney and client, guardian and ward, trustee and cestui que trust exists, the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connection; and that where the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness with its effects, and of undue influence exercised or unfair advantage taken, cannot be more rigorously defined. Nor is it, perhaps, advisable that any strict *rule should be laid down,—any precise line drawn. If it were stated that certain acts should be the only tests of undue influence, or that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, how easy would it be for cunning men to avoid the one, or protect themselves by

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(1) 13 Ves. at p. 138. In *Morgan v. Minett* (1877) 6 Ch. D. 638, 646, this *dictum* was carried out to the fullest extent by an actual decision. But the true rule, as laid down in a later case by the C. A., is that the

donor must have competent independent advice: *Liles v. Terry* (note on p. 30 above).—F. P.

(2) 7 R. R. at p. 197 (9 Ves. 296).

(3) 10 R. R. 5 (15 Ves. 34).

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means of the other, and so place their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach ! If any one should say that a rule is thus recognised, which from its vagueness cannot be obeyed because it cannot well be discerned, the answer is at hand. All men have the interpreter of it within their own breasts ; they know the extent of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant that others similarly circumstanced should do with regard to themselves.

The circumstances of each case, therefore, are to be carefully examined and weighed, the general rule being of a kind necessarily so little capable of exact definition ; and on the result of the inquiry we are to say, has, or has not, an undue influence been exerted,—an undue advantage taken ?

We may first of all observe, upon the facts of the present case, that the alderman had the confidence of Admiral Hunter to a certain degree, and was accustomed to advise him in certain matters. He had been in habits of intercourse with him both in society and in business for many years, and he was employed as his agent and banker ; that is, he acted professionally as his navy agent, received and paid away his money, answering his drafts, and was naturally consulted by him in his money matters from the acquaintance he had with such transactions. That he was consulted by him beyond *this in the disposition of his property, no where appears. Many men of business advise their customers or friends as to buying and selling stock, and otherwise dealing with their funds, who would be surprised at being asked how their testamentary dispositions ought to be made ; and the habit of consulting upon even all the details of a man's money transactions, would be very far indeed from entitling any banker or agent to give the least hint as to such arrangements.

The two individuals, however, had, besides the intercourse of acquaintance and business, been united in very strict friendship for a period of above forty years. Their ages were very different ; but they had been shipmates in former times, and the correspondence as well as all the evidence shews, that there was no one for whom the veteran seaman had so great a regard

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as his ancient friend and comrade. If this bond may be said to have increased the alderman's means of influencing him, it opens on the other hand a source of kindness and preference altogether legitimate and pure. Indeed, this consideration goes further; it materially lessens the weight of any remark that might arise upon the exercise of influence acquired by confidential employment; and further still, it even impairs the force of any inference to be drawn from the other relations in which the parties stood towards each other, in proof of the fact that such influence had been used; for it affords an explanation of the favour shewn, without having recourse to the supposition that the knowing or crafty counsellor had practised upon the less wary client.

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His Lordship then dealt with the evidence which had been adduced to shew that Admiral Hunter was not fully competent to understand the transaction in question, and that advantage had thus been taken of his ignorance or weakness. Upon this point his Lordship observed:]

If Roberts and Jackson (1) are believed, it must be admitted that the admiral, in the entire possession of his faculties and with a full capacity to manage his affairs and dispose of his property, had formed the deliberate intention of executing this deed in favour of a friend towards whom he entertained extraordinary esteem and gratitude; that he well understood what he was doing; that the deed was prepared from his own express instructions, and read over to him on one day; that he was furnished with an abstract or summary, which he carried home with him; that he returned on the morrow, when it was read over and explained to him, and that he then executed it in the presence of two other witnesses, clerks of Mr. Roberts. Can any influence which the alderman may be supposed to have possessed over him invalidate such a deed, without a tittle of proof beyond what is derived from the fact itself of its effect being to give him a preference over near connexions, and from the relation of navy agent and the habits of friendship that

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(1) Jackson was a clerk of the defendant Atkins, by whom Admiral Hunter was introduced to the defen-

dant Roberts at the latter's office on the 10th July, 1823 (3 My. & K. p. 121).—O. A. S.

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subsisted between them, those habits furnishing at the same time an explanation of the favour and affection shewn, without having recourse to any supposition of undue practices? But if, on such grounds, a deed so prepared and so executed is to be set aside, few assuredly of the acts of men, dealing with their own affairs, are safe, and the law which enables all who are of sound mind to dispose of their property, no longer exists but in name.

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That the admiral was not perfectly acquainted at the time with the nature of the transaction in question is incredible, unless Roberts and Jackson have forsworn themselves; and any evidence tendered to prove him at a subsequent period ignorant of what he had done would be extremely inconclusive, even after a short time had elapsed, because his memory at so advanced *an age might have failed during the interval. But the proof, as far as it goes, is upon the balance the other way. Five days after the execution of the deed and making of the will, he writes to the alderman a letter of much kindness, in which, after saying that he had called to take leave of him, perhaps for ever, he observes, that in his will, left, he says, with the alderman, there was a mistake in giving M'Duffie 30*l.* instead of 100*l.* which he ought to have done, from the kindness and gratitude he bore towards his father. The deed certainly contained a gift of 30*l.* to that gentleman. In September following, he writes to the alderman another letter full of affectionate kindness, and observes that he was not quite satisfied with his will, having had "gout both in his head and his heels at the time, and not well recollecting how it was finished." The alderman supposing he meant his will, though it is contended he used that word to describe the deed, says in reply that it is at Roberts', and he hopes he will make whatever alterations he likes in it without regard to any one, reminding him that he had always desired him to consult his own inclinations alone; in short, using the same language he had employed on the same subject in 1817. The letter mentioning the will is dated the 12th of September, 1823, at Yarmouth, and on the 15th and 16th it is proved by Roberts that the admiral was in Walbrook, and sent for him in order to read over the deed and will; so that if (as the letter

imports) he had at all forgotten their contents, he possibly came to town to have any doubts removed. Roberts read both instruments over to him, when he expressed himself quite satisfied, and said he desired no alteration to be made in them. Roberts adds that he was then in as sound a state of mind as he had been on the 10th and 11th of July. If ever so many proofs had been brought that afterwards, when his faculties were impaired, he had *forgotten the contents of those instruments, it would plainly be immaterial to the point in controversy.

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In a case of this description, much depends upon the character and prevailing humour of the person who is alleged to have been the dupe of designing men, or to have been worked upon by improper influence. But I am bound to say that here the evidence tends to shew the improbability of any such practices succeeding, had they been resorted to. The admiral appears to have been a very different sort of person from what designing men would select for their prey. It is proved by the principal witness for the bill, that he was of an obstinate disposition, more so, indeed, than almost any one we hear of in real life. Far from easily taking a suggestion, or adopting advice given, it was enough to make him do a thing that he was desired to abstain from it; and it is said that the family used to endeavour to lead him upon this principle by a kind of rule of contraries. This account is probably exaggerated, and if it be deemed calculated to meet the evidence that Roberts tried to dissuade him from making the deed (of which evidence the plaintiff had notice in Roberts's answer), it must be admitted to be far too great a refinement, and one which at all events cannot be imputed to Roberts without positive proof that he knew of the strange peculiarity deposed to by Miss Hunter, and one on which even then he must have been a very weak man and an unskilful plotter to have acted; for how could he tell that the admiral would not take him at his word, and, acting for once like other men, listen to the exhortation, and thus defeat the object of the supposed conspiracy? It is assuredly not upon any such nice speculations, and such far-fetched refinements, that men act who are engaged in plots of this *vulgar kind. Then can any

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one doubt that, with all its exaggeration, this account presents us with the picture of a man singularly unlikely to become the dupe of entreaty or the victim of persuasion, and defended, as it were, more than most men, by the peculiar constitution of his mind, from the influence of such artifices?

* * * * *

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Upon the whole I am of opinion that the decree must be reversed. It is enough to say, that the circumstances of the case do not warrant the Court in ascribing the deed in question to undue influence, or influence improperly exerted over a person either of insufficient understanding, or under the control or management of another—the dupe of his artifices, or the victim of his contrivances, or subjected to his sway. The bill, therefore, must be dismissed. But although there have been imputations of a grave nature upon the principal defendant's character, I will not give the costs, and for this reason—the ill-advised conduct of the alderman after the admiral's decease, in repeatedly refusing the particulars sought, unavoidably excited suspicions, and may probably have occasioned the suit. Something of this may be ascribed to the manner in which, from what passed between Mr. Roberts and the plaintiff's solicitor, it may be supposed the demand was made. No improper motive, we are now entitled to say, gave rise to the reluctance. But unfortunately, until the matter was sifted, the suspicions remained; and to this must be added the circumstance of Roberts being the alderman's solicitor; therefore I consider it a case for dismissing the bill without costs.

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1834.
Jan. 23, 24,
25, 29.

Lord
BROUGHAM,
L.C.

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EARL OF RIPON AND OTHERS v. HOBART AND OTHERS.

(3 Myl. & Keen, 169—182; S. C. Cooper temp. Brough. 333; 3 L. J.
(N. S.) Ch. 145.)

Injunction, at the instance of Parliamentary Commissioners for cleansing and improving the river Witham and its navigation, and the drainage of the adjacent lands, against the erection or use of a steam engine by Parliamentary trustees for draining a particular district, applied for on the ground of probable damage to the banks of the river, into which an increased body of water was thereby expected to be thrown, and also on the ground of apprehended injury to the

drainage of the lands within the jurisdiction of the commissioners, refused.

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Principles upon which the Court proceeds in interposing by injunction between public companies or trustees in cases of apprehended mischief or nuisance.

THE bill was filed by the general commissioners of the Witham navigation, constituted under several local Acts of Parliament, for the purpose of draining and improving the fens on both sides of the river Witham, in the districts and parishes therein described, and for restoring and maintaining the navigation of that river from the city of Lincoln downwards to the sea. After setting out the substance of the several Acts of Parliament (2 Geo. III., 48 Geo. III., 52 Geo. III., and 10 Geo. IV.), and the powers and authorities which were vested in the plaintiffs by virtue of those respective Acts, the bill stated, that by another local Act (29 Geo. III., afterwards amended by 2 Will. IV.), certain persons were appointed trustees for embanking and draining the fens and low lands situate within the three parishes of Nocton, Potter Hamworth, and Bramston, in the county of Lincoln, and were for that purpose authorised to make such banks, cuts, delphs, drains, and tunnels communicating with the river Witham, and also to erect such engines and other works, in, through, over, and upon the said fens and low lands as should be necessary for draining and preserving the same, without the control of any persons whomsoever, except such control as might be vested in the general commissioners of the Witham navigation, but that nothing in the last-mentioned Act (the Nocton Drainage Act) was to be construed so as to prejudice or obstruct any works made or to be made by virtue of *the Witham Navigation Act, or to alter or invalidate the powers of the commissioners under that Act.

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The bill then stated that the defendants, the trustees of the Nocton drainage, intended, and were proceeding to erect and use a steam engine, in the parish of Nocton, for the more effectually draining and preserving the low lands within the embankments from injury by floods, by throwing the water out of such lands into Nocton delph; and that the erection of such steam engine would do great and irreparable injury to the banks of the river Witham at the parts therein mentioned, (being the banks which

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the plaintiffs, as such commissioners as aforesaid, were bound to preserve and keep in repair,) and would, to a great extent, break down and destroy the same; whereby the low lands and fens, the drainage of which was provided for by the aforesaid Acts of the 2 and 52 Geo. III., and was under the jurisdiction of the plaintiffs, would be flooded and overflowed, and great and irreparable injury would be done thereto. The bill then charged that windmills only, and no other engines had theretofore been used for throwing off the water from the lands and fens under the jurisdiction of the Nocton trustees, into the delphs and dykes communicating with the river Witham; and that by reason of the variable nature of the wind and the small lift of the windmills, the periods at which such windmills could be effectually used were very uncertain, and generally of short duration; and that it had been found in consequence, that on the occasion of floods, the additional body of water thrown into the river Witham by the use of such windmills had been thrown into the same by slow degrees and during a protracted period of time, so as to cause only a small increase of pressure beyond the usual pressure on its banks: and it charged that by the erection and use of a steam-engine the additional body of *water forced into the Witham from the said low lands would be forced into the same in a much shorter space of time, and in a far more uninterrupted and continuous manner, whereby the pressure on the banks of the river would be very greatly increased, and their strength and stability greatly damaged or endangered. The bill prayed that the defendants, the trustees of the Nocton drainage, might be restrained by injunction as well from erecting as from using any steam engines for the purpose of throwing off the water from or out of the low lands within the three parishes aforesaid, or any parts thereof, into the delph or drain called the Nocton delph, or into any other delph, drain, or channel communicating directly or indirectly with the river Witham; or at any rate from using any steam engine for the purpose aforesaid, so as in any manner to injure the banks of the said river, or to injure or interfere with the draining and improving of the low lands and fens mentioned and comprised in the Act of Parliament constituting the commissioners of the

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Witham navigation, or any works erected or performed by such commissioners.

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A motion was now made in the terms of the prayer of the bill. Very voluminous affidavits were filed on both sides, chiefly with reference to the probable effect of the proposed working of a steam engine on the draining of the lands lying lower down the Witham, and its effect in throwing an increased body of water into the river, and thereby augmenting the pressure upon its banks. The general character and purport of the affidavits are stated in the judgment.

Mr. Pepys, Mr. Knight, and Mr. Spurrier, for the motion.

The Attorney-General (Sir W. Horne), Sir E. Sugden, Mr. Kindersley, and Mr. W. C. L. Keene, contra :

The motion was resisted chiefly upon three grounds; first, that the case of probable mischief was not sufficiently made out upon the affidavits; secondly, that even if it were, the Court never had interfered and never would interfere upon its own mere speculation or conjecture of probable danger, especially in a case where the injury, if any, was not of a private but a public kind; and, thirdly, that, even if the two prior points were conceded, still the plaintiffs had been guilty of such *laches* in applying to the Court to stop the defendants' proceedings, that the Court would not now interpose. * * *

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THE LORD CHANCELLOR :

Jan. 29.

This was an application by the general commissioners of the Witham navigation for an injunction to restrain the Nocton trustees from erecting or using any steam engine or engines for throwing off the water from the low lands of the three parishes under their management, into any drains communicating directly or indirectly with the river Witham; or, in the alternative, from using any such engine thus throwing off the water, so as in any manner to injure the banks of the river Witham, or interfere with the drainage of the lands lying lower down the river than the Nocton lands.

The second branch or alternative of the motion may easily

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be disposed of in the outset. There is now before the Court a mass of affidavits and counter-affidavits, extending to seven sets, and containing the representations of opinions, with the facts or alleged facts and reasons on which they rest, formed by skilful professional men as well as other persons, chiefly directed to determine this question—whether any use that can be made of the engine erecting by the Nocton trustees will prove detrimental to the navigation of the Witham. That engine is of forty-horse power, and equal to twenty-seven windmills, and capable of raising the water nine feet instead of four, the height to which it is now lifted; and there are about as many witnesses to support the one side of this question as the other. Nay, it would be easy to find respectable testimony among the witnesses for the defendants which would go far to prove that there was hardly any steam power which could injure the navigation; while the evidence for the plaintiffs would justify the Court in concluding that hardly any change could be made in the power at present used without damage to the river works and the drainage of the lower lands.

[In illustration of this diversity of opinion, his Lordship here referred to a few of the statements contained in some of the affidavits, and then continued:]

The conflict of these opinions is undeniable, and evinces the impossibility of any one being able to tell before-hand whether any given change proposed to be made is or is not such as in any manner to injure the banks of the Witham, and interfere with the drainage of the lower lands. What purpose then could such an injunction serve, as the second alternative of the motion describes? It would give no information,—it would

[*174] *prescribe no rule or limits to the defendants; it could not in any manner of way be a guide to them, if it did not operate as a snare. It would in reality amount to nothing more than a warning that, if they did any thing which they ought not to do, they would be punished by the Court; but it would leave to themselves to discover what was forbidden and what allowed. If, after receiving such a warning, they acted upon the opinion of impartial and experienced professional men, and yet some damage followed, this Court could not visit them very severely.

The parties injured might then, indeed, recover damages at law, having leave to sue; but so they may of course recover damages if no injunction be granted, and without asking the Court's leave to sue.

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I can see no ground whatever, therefore, for granting an injunction of this description, which fails in the very point that forms the ground of the relief,—the preventing irreparable mischief. In the present case, till the event happens no man can take upon himself to say with confidence, upon such evidence as is here brought forward, whether or not mischief will happen from any given change of machinery, so long at least as that change does not go to a length so great as to be extravagant, and to which no one supposes the defendants could think of proceeding.

But it may be said that the uncertainty, the ignorance in which the party will necessarily be, and the risk he will run of being in contempt should the event prove his operations to be injurious, will prevent him from doing any thing; he will follow the homely maxim of standing still in the dark, or of doing nothing when he knows not what to do. Then, if so, this is obtaining the first of the two alternatives, under colour of asking the second; for it makes the injunction amount to a restraining *from erecting or using any steam engine at all; and, undoubtedly, if such would be the consequence, as it very possibly might, of the qualified restraint, it is far better to grant the injunction openly, directly, and in plain terms, that is, to prohibit all such works at once by granting the first alternative.

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Let us then consider whether or not such an injunction ought to go,—an injunction to prevent the erecting or using of steam engines. To this an objection has all along struck me as important, and, indeed, decisive of the whole question. The thing sought to be restrained is not in itself injurious or noxious, but a thing which may or may not be so, namely, the erection of steam engines, against which an injunction is prayed, because it is apprehended that the working of those engines will injure the navigation of the inferior districts. The intention to erect the engines is not denied. Notice was formally given of it.

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But the erection of the engines is not the doing of the damage ; it may give the Nocton trustees a power of mischief with which their present machinery does not arm them ; it may put into their hands an instrument with which they may be enabled to work mischief ; but can this, with any correctness, be said to be in itself damage ? There is nothing strained in the supposition that they may raise by steam only so much water as they now raise by wind power ; that is, they may never, in the course of any day, raise more water ; though, from the greater excellence of the engine, its more entire obedience to control, and its more equable effect, they may be enabled to work at all times when its services are wanted, and possibly to drain off, in the course of a year or a month, a much greater body of water, but to draw it off without the possibility of damage to any one ; and, in like manner, if the raising the water *to a height beyond what can now be gained is the cause of mischief, it is not certain that they will so raise it.

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If, indeed, this be a work which not only gives the power of doing mischief, but cannot be used, or can hardly, in the common course of things, be used without working mischief ; if, in short, it be a thing which can scarcely be used without being abused, the case comes to be very different. For, in matters of this description, the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming. Accordingly, if it appeared that the works in question could hardly be used without damage to the inferior districts, I might hold that erecting them was, in itself, a beginning of injury, though there might be a possibility of otherwise using them ; and if the damage, should it happen at all, were the destruction

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of the navigation, and the subjecting of the lower districts to a deluge, I might scrutinise less narrowly the probability of the engines being injuriously worked.

But upon carefully examining the evidence, and indeed it might be enough to say, upon attentively considering the nature of the case, the kind of works and of working in question, and the sort of mischief apprehended, *there is no reason for holding that the danger is either certain or very imminent, or that mischief of a very overwhelming nature is likely to be suddenly done; or indeed that any serious injury can be done, without time being afforded for coming to the Court with a case free from the present defects.

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I shall not enter into the particulars of the evidence, as I agree with his Honour, the VICE-CHANCELLOR, in the conclusion to which he came. But I cannot help remarking that some security is afforded by the very nature of the engines complained of, the use of which is the ground of the plaintiffs' apprehension. If the steam engine is of far greater power than the old machinery, it is also far more easily controlled. It may be an instrument of mischief beyond any that the present number of windmills could produce; but its force is so perfectly manageable, that they who work it, and not the engine, will be to blame if mischief ensues. What is the necessary inference? Plainly this; first, that the engines which are objected to do not unavoidably, and as it were of themselves, and merely because they are made and used, produce the evil apprehended, but that something more must be done voluntarily and deliberately by the owners beyond the mere putting of them in motion; and next, that if those owners do act thus, and find that actual damage is doing or beginning to be done, they have the power of instantly stopping, and, by the adjustment of the force used, putting an end to the evil; and if they stop it not, then that the other party may apply to the Court.

To such an application there will then be no possibility of answering that the expense of erecting the engine was already incurred, and that this ought not to have been suffered by the commissioners; for the present *proceeding has given sufficient warning; and besides, if the ground upon which this injunction

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is refused be a sound one, they were not bound to prevent any steam engine from being erected, but only to restrain such a use of it as destroyed the navigation.

If, however, that ground be denied or deemed insufficient, and if this mischief be of a kind which consists in the erection of the engine, and not in the mode of working it, it follows that it must be so treated throughout. Have the plaintiffs so treated it? Taking that, which is of necessity their view of the question, have they so proceeded as to give them a right to the assistance of this Court? It appears to me that they have not.

[His Lordship then stated the several communications which had passed between the Nocton trustees and the commissioners of the Witham navigation, and the different steps taken by the latter with a view to oppose the intended erections, and proceeded:]

The result of the whole was, that the question could not come on for discussion in this Court before the 20th of December last, after considerable progress had been made in the works, and sums of money been expended upon them, independent of contracts being entered into at the earlier period. The danger apprehended in the case of the *Birmingham Canal Company v. Lloyd* (1) was one of a very serious nature,—that of draining off the water from a great reservoir of the canal: and yet Lord ELDON refused the injunction, leaving the company, as he said, “to take their chance at law,” because they had delayed coming to the Court till two years after notice from the defendants. Here, indeed, the delay was only nine months; but there was a counter-notice in that *case as well as in this, and it made no difference in the consideration of the Court as to the party’s *laches*. Lord ELDON there added, “They must establish their right to damages at law before I ought to grant this injunction.” So that he held their delay to have been sufficient to deprive them of the preventive relief altogether, inasmuch as the damage must, in great part, have been done before they could obtain their verdict and again come to this Court. But the conduct of the plaintiffs here gives rise to the further remark, that in a case of this kind, where the application is not against an admitted

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(1) 11 R. R. 245 (18 Ves. 515).

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nuisance, but against a work which may or may not be noxious according to circumstances, the party alleging mischief has no middle course between coming in the very first instance, and waiting until he can satisfy the Court, by a verdict at law, that he is right both as to his title and as to the mischief.

In considering more generally the question which is raised by the present motion, I certainly think we shall not go beyond what both principle and authority justify if we lay down the rule respecting the relief by injunction, as applied to such cases, to be this: If the thing sought to be prohibited is in itself a nuisance, the Court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the Court will refuse to interfere until the matter has been tried at law, generally by an action, though, in particular cases, an issue may be directed for the satisfaction of the Court, where an action could not be framed so as to meet the question.

The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable which would be very slow to interfere where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property which are *primâ facie* harmless, or even praiseworthy, is equally manifest; and it is always to be borne in mind that the jurisdiction of this Court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned Judges to use it, even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. All that has been said in the cases where this unwillingness has appeared, may be referred to in support of the proposition

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which I have stated; as in *The Attorney-General v. Nichol* (1), *The Attorney-General v. Cleaver* (2), an *Anonymous* case (3) before Lord Thurlow, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the case of what we have been regarding as eventual or contingent nuisance. But some authorities approach very near the ground upon which I have relied: Lord HARDWICKE, in *The Attorney-General v. Doughty* (4), speaks of a plain case of nuisance as contradistinguished from others, and as entitling the Court to grant an injunction before answer.

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Lord ELDON at one time appeared to think that there was no instance of an injunction to restrain *a nuisance without a trial. But though this cannot now be maintained, it is clear that in other cases where there appeared to be a doubt, as in *Chalk v. Wyatt* (5), the injunction was said only to be granted because damages had been recovered at law.

The course which has been pursued at law, with respect to different kinds of obstructions and other violations of right, furnishes a strong analogy of the same kind. Lord HALE, in a note to Fitzherbert's *Natura Brevium* (6), speaking of a market held in derogation of a franchise, says, that if it be kept on the same day it shall be intended a nuisance, but if it be on another day it shall be put to issue whether it be a nuisance or not: and the case of *Yard v. Ford* (7) seems to recognise the same distinction.

Upon this view of the question, then, it seems impossible to grant the injunction. But, advertng to the circumstances of the case, the conduct of the parties both before and since the cause came into Court, and the conflict of opinion among the professional men, which the evidence unquestionably discloses, the inclination of the Court would naturally be this, independently of the objection to which I have mainly adverted. There can be no satisfactory way of determining on which side

(1) 10 R. R. 186 (16 Ves. 338).

(2) 18 Ves. 211: see 18 R. R. 159, n.

(3) 1 Ves. Jr. 140.

(4) 2 Ves. Sen. 453.

(5) 3 Mer. 688.

(6) 184, n. (b).

(7) 2 Saund. 172.

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the true opinion lies without actual experience. A trial at law might, probably would, by the examination of witnesses, and the view afforded to the jury in the company of skilful and experienced persons, throw important light upon the subject. Nevertheless, the only means of attaining certainty, amidst the discrepancy of learned opinions, is actual experience. If the waiting for that might, by any *proximate possibility, occasion such irreparable and extensive damage as some of the witnesses speak of, the inducement would be strong to grant an injunction in the meantime. But, upon the whole result of the evidence, there does not appear to be such a reasonable ground of apprehension as imperatively to call for this course here. If that be so, the consequences of granting the injunction are then to be regarded. These are by no means to be compared with the consequences of shutting up a colliery or other mine which may be flooded, or a trading concern which may, from its nature, be destroyed for ever, if suspended for a month. Nevertheless they are not to be put out of view. The engines have been erected, and the order would prevent them from working, and that too after the money had been invested in their construction, in consequence of the plaintiffs having from October to February done nothing but repeat a notice, and nothing at all from that notice till June, although aware in September of the intention to build the engines, and not apprised afterwards by any act or any communication that the intention was abandoned.

All this leads to the conclusion that things should be suffered to continue as they now are.

His Lordship concluded his judgment by refusing the motion, and by recommending that the parties should agree to refer the matters in question to some individual of respectability and skill resident on the spot, to whom might be intrusted the discretion of directing at what times the working of the proposed new machinery should be relaxed or suspended, and who might be the person to determine whether the application to the Court should be renewed.

A subsequent application for an issue was also refused.

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a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle, and it goes the full length of the present case.

But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all.

[His Lordship here referred to some cases on this point which are now obsolete, and continued as follows:]

[*225] I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife *is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing where that Act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle.

* * * * *

1834.

Jan. 20.

Rolls Court.

LEACH, M.R.

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BUTLER v. BUSHNELL (1).

(3 Myl. & Keen, 232—236; S. C. 3 L. J. (N. S.) Ch. 139.)

A testator bequeathed part of the residue of his property to trustees, in trust for his daughters during their lives, and after their respective deceases, for their children, and in case there should be no children of his daughters respectively, in trust for such person or persons as should happen to be his next of kin according to the Statute of Distributions: Held, that upon the death of a daughter, who survived the testator, without issue, her share went to the persons who were the testator's next of kin at her death.

JOHN BUTLER, by his will, dated the 19th of June, 1816, bequeathed his residuary personal estate to Henry Dibbin and

(1) It is scarcely probable that this case would now be followed. See the note to *Briden v. Hewlett*, 39 R. R. 146 (2 My. & K. 90), and the cases there cited.—O. A. S.

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John Bushnell, whom he appointed his executors, upon trust to invest the same in Government or real securities, and out of the dividends and interest thereof to pay to each of his daughters, Hannah, Maria, and Caroline, the yearly sum of 50*l.*, so long as they should respectively reside and live with their mother, and remain unmarried; and in case they, or either of them, should not so reside with their mother, then the yearly sum of 100*l.* each; and as to the rest and residue of such dividends and interest, in trust to pay the same to his wife, Hannah Butler, during her natural life, or during such time as she should continue a widow, to be by her applied for the maintenance of herself, and the maintenance and education of his son, John Butler, and his daughters, Hannah, Maria, and Caroline; but in the event of the marriage of his wife after his decease, in trust out of the dividends and interest, to pay her an annuity of 20*l.* by half-yearly payments; and after the decease, or after such marriage, and during the remainder of the life of his wife, in trust for his son, John Butler, and his daughter Sarah, the wife of the defendant Bushnell, and his daughters, Hannah, Maria, and Caroline, in equal shares and proportions, except as to the share of his daughter Sarah Bushnell, whose share he directed should be less by the sum of 3,000*l.* than the share of either of his other daughters, having given her that sum on her marriage; and as to the share of his son, John Butler, in trust to pay the interest and dividends for his maintenance till *he should attain the age of twenty-one, and, on his attaining twenty-one, to transfer the same to his son to his own use; and as to the respective shares of his daughters, to pay the interest to them respectively during their or her lives or life, to their separate use, and after their respective deceases, in trust for the benefit of their children as therein mentioned; and in case there should be no child or children of his daughters respectively, or if such child or children, being a daughter or daughters, should die under the age of twenty-one without being married, or, being a son or sons, should die under the age of twenty-one years, then in trust for such person or persons who should happen to be his (the testator's) next of kin according to the Statute of Distributions.

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The testator died leaving the five children named in his will.

The bill was filed for the administration of the testator's estate by Maria Butler, and Caroline Butler, an infant, by Maria Butler, her sister and next friend, against John Bushnell, the surviving executor, the widow, and the other children of the testator, and other parties interested under the will.

The usual decree was taken at the hearing, and before the cause came on to be heard for further directions on the Master's report, Maria Butler died without having been married. The suit was revived, and, by the minutes as they were submitted to the Court at the hearing on further directions in the revived suit, it was assumed that the next of kin at the testator's death were entitled to the share of Maria Butler; but the MASTER OF THE ROLLS having expressed a doubt whether the next of kin of the testator at the death of Maria *Butler might not be entitled, the cause was directed to stand over, and now came on to be argued as to that point.

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Mr. Garratt, for the plaintiff, Caroline Butler, submitted that the probable intention of the testator was that, in case of the death of any one of his daughters without a child, her share should go to the person or persons who might, upon the happening of such contingency, be his next of kin: *Jones v. Colbeck* (1) and *Bird v. Wood* (2).]

Mr. Ching, for defendants in the same interest with the plaintiff.

Mr. Wright, for John Butler, the son, and the administrator of Maria Butler, contended that there was nothing in this will to shew that the testator intended any other persons to take under the ultimate limitation than those persons who should be his next of kin at the time of his death: * * *Holloway v. Holloway* (3), *Doe d. Garner v. Lawson* (4), *Elmsley v. Young* (5).

(1) 6 R. R. 207 (8 Ves. 38).

(3) 5 R. R. 81 (5 Ves. 399).

(2) 25 R. R. 238 (2 Sim. & St.
400).

(4) 7 R. R. 454 (3 East, 278).

(5) 39 R. R. 353 (2 My. & K. 82, 780).

THE MASTER OF THE ROLLS:

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In this case the testator gives to his daughter Maria Butler a certain portion of his residuary property, subject to the life interest of his widow, for her life, and after her decease for her children; and he directs that, in case she should die without children, then the share of the property given to her should go to such person or persons as should happen to be his next of kin; and the question is, who are entitled to take under that gift. The parties had assumed that the next of kin here intended were necessarily the next of kin at the death of the testator, but it appeared to me very doubtful whether the construction thus assumed was the right one, and I called the attention of counsel to that point, that it might be argued before me.

In the case of *Elmsley v. Young*, which was recently before the Court, I took occasion to examine very fully all the authorities on this point, and I then referred to a case of *Briden v. Hewlett* (1), which in the language used by the testator resembles the present case. One of the propositions then laid down by me was, that where a testator gives property over to his next of kin, after the death of a tenant for life without issue, the Court must look at the whole will to ascertain who are the next of kin intended by the testator to take. In *Elmsley v. Young* the ultimate limitation was made expressly to those persons who should be the settlor's next of kin at his death, so that there could be no question that the tenant for life who answered that description was entitled. In *Briden v. Hewlett* there was no express designation of the next of kin at the death of the testator, but the gift was to the testator's widow *for her life, with remainder as she should appoint, and in default of appointment to such person or persons as would be entitled by virtue of the Statute of Distributions; and I was of opinion, looking to the intention of the testator to be collected from the whole will, that the testator meant his next of kin living at the death of the tenant for life.

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Where a testator gives property to a person for life with remainder to his children, and if he should die without children, then over to his next of kin, it is not a probable intention that

(1) 39 R. R. 146 (2 My. & K. 90).

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he should mean to include, as one of his next of kin, the person upon whose death without issue he has expressly directed that the property should go over. In looking to the cases, it appears to me that the Court always considers whether the words of limitation are words of present intention, so that they are intended to take effect as soon as the testator's next of kin, living at his death, are ascertained; or whether they import a future period, and are referable to the event upon which the gift over is to take effect. The words "such persons as shall happen to be my next of kin," or "such persons as shall, or should be my next of kin," indicate an intention to confine the gift to such persons as shall answer the description of the testator's next of kin at the death of the tenant for life. I am of opinion, therefore, in this case that it was the intention of the testator that the share of Maria Butler should, upon her death without issue, vest in such persons as should then be his next of kin.

1834.
Feb. 3.

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RAY v. ADAMS.

(3 Myl. & Keen, 237—244.)

Where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the Court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate.

[JOHN HIGGINBOTHAM, by his will dated the 16th of May, 1812, devised and bequeathed his residuary estate and effects to his wife Lydia, and to Benjamin Griffin and Robert Hawkesley, their heirs, executors, and administrators, upon trust to convert the same and invest the proceeds in their names in the purchase of 3 per cent. consolidated Bank Annuities, and to pay out of the dividends thereof to his said wife and her assigns an annuity of 100*l.* during her life, also to pay to his son, John Daniel Higginbotham, the sum of 2*l.* 2*s.* weekly, on Monday in each week during his life, and to pay other annuities as therein mentioned; and upon the decease of his said son, John Daniel Higginbotham, he directed the stocks and funds out of which his said annuity of 2*l.* 2*s.* per week was made payable to be sold,

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and the produce thereof, after deducting all costs and expenses attending the same, to be paid unto his said wife, "*not doubting but she will dispose of the same for the benefit of such of my relations as may stand in need.*" In case the residue of his estate should be more than sufficient to provide for payment of the said annuities, he gave the surplus residue to his said wife for her own use absolutely, and he thereby nominated and appointed his said wife, the said Benjamin Griffin, and Robert Hawkesley joint executors of his will.]

The testator died soon after the date of his will, leaving Lydia Higginbotham, his widow, and John Daniel Higginbotham, his only son, surviving him.

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The will was proved by the executors named therein, who appropriated, out of the residue of the testator's estate, a sum of 3,640*l.* 3 per cent. consolidated Bank Annuities for the payment of the weekly sum of 2*l.* 2*s.* to John Daniel Higginbotham; and also set apart other *sums of stock for the payment of the other annuities thereby given].

[*239]

Lydia Higginbotham survived her co-executors, and the sums of stock so appropriated were standing in her name at her decease. She died in the year 1823, in the lifetime of John Daniel Higginbotham, having made a will, dated the 2nd of October, 1823, to the following effect: "I give, devise, and bequeath to my executors hereinafter appointed, all my ready money, securities for money, debts due and owing to me, money in the public stocks or funds, and all and singular other the property, of what nature or kind soever the same may be, of which I may die possessed, not herein by me specifically bequeathed, upon trust that my executors shall and do, with all convenient speed after my decease, convert into money all such part of my estate and effects which shall not be already so converted, and invest the same in the public stocks or funds, or otherwise upon Government securities, for the purpose of securing and paying the several annuities hereinafter bequeathed; and provided the monies which may be already invested at the time of my decease should be insufficient for that purpose, upon trust, in the first place, to pay and allow to John Daniel Higginbotham, the son of my late husband, the sum of 2*l.* 2*s.*

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v.
ADAMS.

weekly and every week during his natural life, to be paid to him every Monday, in pursuance of the will of my late husband, and any other annuities that may be then payable under the said will, and upon trust to pay the several annuities following." The testatrix, after giving several annuities, [disposed of the residue of her estate as therein mentioned, and appointed Jacob Ray and John Mackie her executors, who proved the will].

[240] None of the legatees named in the will of Lydia Higginbotham were relations of the testator, John Higginbotham, except John Daniel Higginbotham.

John Daniel Higginbotham died in May, 1830, leaving William Woodbridge his sole next of kin, and next of kin of the testator; and having made a will, by which he appointed John Clark and his wife Susannah Higginbotham his executors. [William Woodbridge died intestate, and his widow, Catherine, was his administratrix.

[241] The bill was filed by Jacob Ray and John Mackie,] for the purpose of having the rights and interests of the parties in the sum of 3,640*l.* 3 per cent. Bank Annuities, which had been appropriated for the payment of John Daniel Higginbotham's annuity, declared by the Court.

[Catherine Woodbridge was made a party by supplemental bill.]

The only question, when the cause came on for further directions, was to what party the sum of 3,640*l.* 3 per cent. Consols, which had been appropriated for the payment of two guineas a week to John Daniel Higginbotham, belonged.

Mr. Bickersteth and *Mr. Younge*, for [the plaintiffs] the personal representatives of Lydia Higginbotham, who were also two of her residuary legatees:

The testator directs the stock out of which the sum of two guineas a week was made payable to be sold upon the decease of his son, and the produce to be paid to his wife, not doubting that she would dispose of it for the benefit of such of his relations as might stand in need. He seems not to have contemplated, and at any rate has made no provision for the contingency of the death of his widow before his son. By that event it *became impossible to execute the trust reposed in the

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discretion of the widow, and the testator has, therefore, died intestate as to the capital sum of stock out of which the annuity to the son was payable. The estate of the widow is consequently entitled to one third part of the 3,640*l.* 3 per cent. Consols.

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v.
ADAMS.

Mr. Tinney and Mr. Ching, for the executors of John Daniel Higginbotham, the son :

The testator gives to his wife the produce of the fund set apart for securing the annuity to his son, not doubting that she would dispose of the same for the benefit of such of his relations as might stand in need. This is a trust coupled with a power to be executed at the discretion of the widow ; and as the widow did not live to exercise that discretion, the execution of the trust devolves upon the Court.

The only question is, who are the relations to whom the fund is to be distributed ; and the Court has in similar cases decided, that the next of kin of the testator living at the death of the person failing to execute the power are entitled : *Harding v. Glyn* (1), *Cruwys v. Colman* (2), *Cole v. Wade* (3). In *Cole v. Wade* the Court executed the trust in favour of the next of kin at the death of the testator ; a circumstance which, even if it essentially distinguished that case from the other cases cited, would not affect the title of John Daniel Higginbotham ; but the difference is only apparent, and arose from the testator's executors having been the parties named to execute the trusts, and from there being no preceding *life-estate to require a

[*243]

Mr. Wakefield, for [Catherine Woodbridge] the representative of the next of kin at the death of John Daniel Higginbotham :

It is clear that it was not the intention of the testator that the wife should exercise the discretion vested in her till the death of the son. By her death, therefore, in the lifetime of the son, the power was gone ; and the next of kin, living at the death of John Daniel Higginbotham, were entitled ; for it could never

(1) 4 R. R. 334 (1 Atk. 469).

(3) 10 R. R. 129 (16 Ves. 27).

(2) 7 R. R. 210 (9 Ves. 319).

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v.
ADAMS.

have been the intention of the testator that his only son, or his widow and son, should answer the character of "relations" among whom the gift was to be distributed by his widow on the death of his son.

Mr. Pemberton and Mr. Bethell, for Ann Adams and Sarah Adams, two of the residuary legatees of the widow [supported the plaintiffs' contention].

THE MASTER OF THE ROLLS :

[*244] Where a trustee has a power of disposition which he neglects to execute, the execution of the trust devolves on the Court ; but the question in this case is, whether, *in the events which have happened, the trust and power intended for the widow ever vested in her. The plain intention of the testator was that, after the death of his son, his widow should dispose of the property to such of his relations as then stood most in need of it ; but, the widow dying in the lifetime of the son, the trust intended never vested in her, but entirely failed. The testator has in fact, therefore, made no effectual disposition of the property after the death of his son ; and he is to be considered as having in that respect died intestate, and the fund must be divided according to the Statute of Distributions, namely, one third to the representatives of the widow, and two thirds to the representatives of the son.

1834.
March 26.
—
Lord
BROUGHAM,
L.C.
[245]

GRANT v. YEA.

IN THE MATTER OF YEA, AND IN THE MATTER OF THE ACT FOR THE ABOLITION OF FINES AND RECOVERIES.

(3 Myl. & Keen, 245—247.)

Order made by the LORD CHANCELLOR as protector under the 3 & 4 Will. IV. c. 74, to enable a *quasi* tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund.

THE lunatic was tenant for life, and the petitioner, his eldest son, was *quasi* tenant in tail in remainder of a sum of 1,231*l.* 3 per cent. Consols, being the produce of certain lands which

had been sold under an order of the Court in a cause, and which sum was declared to be subject to the same uses as the lands had been subject to. The petition prayed that the LORD CHANCELLOR, as protector under the Act for the Abolition of Fines and Recoveries, would concur with the petitioner in barring the estate tail and the ulterior limitations to which the stock in question was subject, for the purpose of enabling the petitioner to convert the stock into money, to be applied in the purchase of a commission in the army.

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v.
YEA.

It appeared from the affidavit made in support of the petition by the lunatic's brother-in-law, who was committee of the estate, that the lunatic was in a state of hopeless lunacy; that he was possessed of landed estates of the value of 2,500*l.* a year, and of property in the funds yielding an annual income of 400*l.*; that a yearly allowance of 1,300*l.* was made to his wife for the maintenance of the lunatic; and that the petitioner who was a lieutenant in the army had an allowance of 400*l.* a year out of the estate; that the purpose to which the principal part of the money in question was to be applied was the *purchase of a captain's commission for the petitioner, who had entered the army with the full approbation of his father, and who, it was represented, had now a favourable opportunity of purchasing a step.

[*246]

Mr. Robertson, in support of the petition, stated that the application was made to the discretion of his Lordship, under the provisions of the recent Act (3 & 4 Will. IV. c. 74), and submitted that the circumstances of the case were such as would justify the Court in interposing its authority. He referred particularly to the 15th, 22nd, 33rd, 48th, 49th and 71st sections of the Act.

Mr. Treslove, for the committee of the estate and the next of kin, and *Mr. Hallett*, for the lunatic's younger brother, who had a charge upon the fund, consented to the application.

The LORD CHANCELLOR expressed his opinion that this was a case which fell within the provisions of the 33rd and 48th sections of the Act referred to, and that the circumstances were such as to justify him in exercising his discretion.

GRANT
C.
YEA.

An order was accordingly made, referring it to the Master to inquire and state whether, under the limitations in the settlement, the stock in question was subject to be laid out in the purchase of land, and upon what uses, and who would be entitled thereto if such purchase were made, and whether the lunatic was the person who, if he were of sound mind, would be the protector of the settlement within the meaning of the Act.

August 2.

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The Master having found the facts stated in the petition, the Court made an order confirming the report, and directing the stock to be sold and the produce to be *paid to the committee, to be applied in the advancement of the petitioner in the army, and that the petitionér's allowance out of his father's estate should be reduced, to the extent of the dividends on the stock ordered to be sold.

1834.
March 26.
Lord
BROUGHAM,
L.C.
1835.
March.

IN THE MATTER OF BLEWITT.

(3 Myl. & Keen, 250—251.)

[OVERRULED by Lord CRANWORTH, L. C., and the LORDS JUSTICES in 1855—6, as reported in 6 De G. M. & G. 187.—O. A. S.]

Lord
LYNDHURST,
L.C.

TALBOT v. THE EARL OF RADNOR (1).

(3 Myl. & Keen, 252—254.)

1834.
Jan. 31.
Feb. 4.
Rolls Court.
LEACH, M.R.

The legatee of a house, held by the testator on a lease at a reserved rent higher than it could be let for after his death, cannot reject the gift of the lease and retain an annuity under the will, but must take the benefit *cum onere*.

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[In this case a] testator bequeathed a leasehold house to his sister, Elizabeth Ackerley, and he also bequeathed to her an annuity for her life. The rent reserved by the lease was higher than the house would let for at the time of the decease of the testator ; and, upon a reference to the Master to inquire whether

(1) It does not clearly appear from this short report that the gifts were an aggregate bequest, and not two separate gifts as in *Syer v. Glulstone* (1885) 30 Ch. D. 614. According to later cases it is doubtful whether the

onus of taking the lease was annexed to the benefit given by the will. See *In re Hotchkys* (1886) 32 Ch. Div. 408, 418, 55 L. J. Ch. 546, 55 L. T. 110. —(O. A. S.)

it would be beneficial for the testator's estate to determine the lease at the end of the first seven years, the Master found that it would be beneficial, and directed the personal representatives to give notice to the lessor to that effect.

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v.
THE EARL OF
RADNOR.

Mrs. Ackerley, the legatee, and her husband, disclaimed the gift of the lease; and a question was made whether, if she disclaimed the lease, she could retain the annuity, as she ought not to be allowed to reject the onerous, and retain the beneficial part of the testator's bequest.

The MASTER OF THE ROLLS was of opinion that, as it was the plain intention of the testator that his estate should no longer be subject to the rent of the leasehold house, the legatee could not, in that respect, disappoint his intention, and retain the benefit given by his will, but must take the benefit *cum onere*.

LESTURGEON v. MARTIN.

(3 Myl. & Keen, 255—256.)

A purchaser does not waive his right to a general reference as to title by accepting the title subject to the removal of a particular objection. If the vendor instead of removing the particular objection files a bill for specific performance the purchaser is not bound by his previous conditional acceptance of the title.

1834.
Feb. 4.
Rolls Court.
LEACH, M.R.
[255]

THE bill was filed for the specific performance of a contract of purchase by the defendant from the plaintiff. It appeared upon the evidence that, upon the first delivery of the abstract, various objections were taken, and the abstract was returned to the plaintiff's solicitor. Observations were made thereon, on the part of the plaintiff, in answer to the several objections, and in a subsequent letter, written by the solicitor of the defendant to the solicitor of the plaintiff, it was stated that it appeared to him (the solicitor of the defendant) that all the objections were removed, except one which applied to an alleged intestacy. Several letters afterwards passed between the solicitors upon the subject of this alleged intestacy, and one of such letters from the solicitor of the defendant inclosed a copy of a case which had been submitted to counsel on the part of the defendant

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v.
MARTIN. for his opinion as to the sufficiency of the evidence with respect to the alleged intestacy, which opinion was unfavourable to the plaintiff. It was a part of the statement in that case, that various objections which had been taken upon the abstract had been either removed or waived, and the plaintiff therefore insisted that the defendant was not entitled to a general reference to the Master to inquire into the title, but that such reference ought to be confined to the question of intestacy.

Mr. Tinney, for the plaintiff.

Mr. Bickersteth, for the defendant.

[256] THE MASTER OF THE ROLLS:

The question raised by the plaintiff as to a limited inquiry involves a point of great general importance. The defendant, by his contract, was not bound to complete his purchase without a full and marketable title, and it is not contended that he has since done any act to the prejudice of the plaintiff, either with respect to the possession of the property or otherwise, which can affect his right to such marketable title. But it is insisted that he has waived that right, and the statement in the case laid before counsel is relied upon as binding him to such waiver. The effect of the correspondence between the solicitors, and the statement in the case for the opinion of counsel, amount to no more than this—that, according to the advice which he had received, he was then willing to complete his purchase, provided the objection as to the intestacy was removed. That objection, however, was never removed, and the voluntary assurance, given at that particular time, would not create a legal obligation upon him to relinquish in all future proceedings his original right to a marketable title. It may turn out, upon inquiry before the Master, that he had been ill-advised as to the effect of some of the objections originally taken to the abstract, or it may turn out that there is matter destructive of the title of the plaintiff which did not appear upon the abstract, and the reference to the Master must therefore be general as to the title of the plaintiff.

COOKE *v.* THE STATIONERS' COMPANY.

(3 Myl. & Keen, 262—266.)

1831.

June 4, 21.

The failure of a bequest for charitable purposes partly raisable out of land enures for the benefit of the devisee of the land and not of the heir-at-law, unless such bequest clearly takes effect by way of exception from and not merely by way of charge upon the land devised.

Rolls Court.

LEACH, M.R.

[262]

THE will of William Fenner, so far as it is material, was to the following effect :

“ After paying all my just debts, funeral charges, and legacies for rings and mourning out of my personal property, I give and devise to my executors hereinafter appointed all my estates, both freehold and leasehold, in trust, desiring they will sell so much of them by private contract, if they can get the several sums or more I have valued them at on a paper inclosed within this will ; when Mr. Marryat’s lease expires, by public sale at auction : what is not disposed of by private contract, not before that time, when they can by sale of personal property, and such part of my estates as will purchase the sum of 10,700*l.* in the 3 per cent. Consols, they need not sell more.” The *testator then proceeded to give a number of legacies, among which was a legacy of 2,500*l.* 3 per cent. Consols to the Stationers’ Company, the interest thereof to be paid to his wife during her life, and a legacy of 800*l.* 3 per cent. Consols to the parish of Beckenham for charitable purposes ; and he gave and devised to his wife, Grace Fenner, the rest and residue of his estate and effects of whatsoever kind, on condition that all the legacies were paid.

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The principal question in the cause was, whether so much of the produce of the real estate as was given to the Stationers’ Company and the parish of Beckenham would go to the heir-at-law or the residuary devisee.

Mr. Bickersteth and *Mr. J. Russell*, for the residuary devisee.

Mr. Tinney and *Mr. Jacob*, for the heir-at-law.

[For the cases cited see the following judgment.]

THE MASTER OF THE ROLLS :

June 21.

This case was disposed of at the hearing on further directions, with the exception of the question whether the heir-at-law, or

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[*264]

the residuary devisee was entitled to *certain void legacies. By a residuary gift of personal estate a testator gives all the personal estate which he leaves at his death not otherwise disposed of. A sum of money given by his will, which fails either as void at law or by lapse, is not otherwise disposed of, and consequently belongs to the residuary legatee. But there is a difference in respect of real estate, because the residuary devisee of a real estate takes only that real estate to which the testator was entitled at the time of making his will, subject to the purposes of the will. Where a real estate is directed to be sold, and the testator wills that a sum of 1,000*l.*, or any other sum of money shall be applied to a particular purpose, and the residue of the produce of sale only is given to A., and the particular purpose fails either by lapse, or because it is void at law, then the heirs and not A. will take the 1,000*l.*, or other sum of money, because the whole is real estate at the death of the testator, and A. can take no more of that estate than is expressly given to him, namely the residue of the real estate, after deducting the 1,000*l.* or other sum.

[In support of this proposition the MASTER OF THE ROLLS cited a number of cases, the application of which to this point is now displaced by s. 25 of the Wills Act, 1 Vict. c. 26.]

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Where real estate is not directed to be sold, and the residuary devise is not of the produce but of the *corpus* of the real estate, there the question arises between the heir-at-law, and the devisee as to the intention of the testator. If the devise to a particular person, or for a *particular purpose is to be considered as intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure. If it is to be considered as intended by the testator to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure. In the case of *Wright v. Horne* (1) the testator devised a particular estate to A. and his heirs, and all the residue of his real estate to B. and his heirs. The devise to A. having failed by his death in the testator's lifetime, the heir, and not B., was held to be entitled to the particular estate, because it was an exception out

(1) 8 Mod. 222.

of the residuary gift. So in *Gravenor v. Hallum* (1) the testator devised his estate, subject to certain annual payments making together the sum of 10*l.*, upon trust to be sold, and directed the produce of the sale to be applied to certain purposes stated in the will with a residuary gift over. These annual payments being void, the heir, and not the residuary devisee, was held entitled to the benefit of them, because they were an exception from the gift to the trustees. But in *Jackson v. Hurlock* (2) an estate was devised subject to and charged with any sum not exceeding 10,000*l.*, as the devisor should afterwards appoint. He afterwards appointed the sum of 6,000*l.* only; and the devisee, and not the heir, had the benefit of the 4,000*l.* which was unappointed. So in *Wright v. Row* (3), where there was a devise of real estate, subject to the payment of 4*l.* a year to a charity, the devisee, and not the heir, had the benefit of the void charge. In *Kennell v. Abbott* (4) Lord ALVANLEY says, "It is now perfectly settled that if an estate is devised charged with legacies, and the legacies *fail, no matter how, the devisee shall have the benefit of the failure." In *King v. Denison* (5) the testatrix devised her real estate subject to and chargeable with certain annuities for life, but survived all the persons to whom the annuities were given. The heir-at-law claimed the whole estate on the ground that it was devised for particular trusts only, which were all satisfied, and that consequently the heir was entitled by way of resulting trust. Lord ELDON held that the devisees took the estate discharged of the annuities.

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In the present case the testator gives and devises to his executors all his freehold and leasehold estates in trust, that by sale of his personal property, and of so much of his real estates as might be necessary, they should raise a sufficient sum to purchase 10,700*l.* in the 3 per cent. Consols, and he directs this sum of stock to be apportioned between certain legatees, and, among other objects of his bounty, to charities, and he then gives to his wife the rest and residue of his estate and effects

(1) *Ambl.* 643.

(4) 4 R. R. 351 (4 Ves. 802).

(2) *Ambl.* 487.

(5) 12 R. R. 227 (1 V. & B. 260).

(3) 1 Br. C. C. 61.

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of whatsoever kind they be, on condition that all the legacies are paid.

The charitable legacies failing of course, as far as they affect his real estate, the question is, whether these legacies are to be considered as an exception from the gift to his wife, or as a charge upon that gift; and being of opinion that they are to be considered as a charge, and not as an exception from the gift, I make a declaration accordingly.

The condition to pay the legacies makes no difference, being no more than a charge of the legacies.

1832.
Feb. 15.

Rolls Court.

LEACH, M.R.

[283]

COSSER v. COLLINGE(1).

(3 Myl. & Keen, 283—288; S. C. 1 L. J. (N. S.) Ch. 130.)

Where a person about to contract for an under-lease has had a fair opportunity of inspecting the covenants contained in the original lease, if he enters and takes possession of the property, he will be bound by those covenants, even though they are unusual.

ANDREW COSSER demised by way of mortgage, to secure the repayment of 860*l.* and interest, certain leasehold houses which he held under a lease, dated the 29th of May, 1824, for a term of sixty-two years, to Savill Godfrey; and he afterwards mortgaged the same premises, and also a piece of ground held under a lease dated the 7th of August, 1822, to his cousin Cosser, the plaintiff, to secure the repayment of the further sum of 863*l.* and interest, but subject to the mortgage of the first lease to Savill Godfrey. In the year 1829 Andrew Cosser became bankrupt, and his assignees, considering the property to be mortgaged for more than its value, declined to accept the leases, and Godfrey and the plaintiff thereupon entered into possession with the consent of the assignees; and at a meeting of the creditors of the bankrupt convened for that purpose on the 5th of February, 1830, a resolution was passed that *the assignees should assign the equity of redemption of the premises to Godfrey and the plaintiff.

The lease of May, 1824, contained a covenant to insure; a covenant to restrain the carrying on, without licence of the

(1) *Reeve v. Berridge* (1888) 20 Q. B. Div. 523, 57 L. J. Q. B. 265, 58 L. T. 836.

ground landlord, of certain noisome trades therein mentioned ; and a covenant to deliver up at the expiration of the term, as well all ordinary fixtures therein enumerated, as “all new erections, structures, and improvements, and all other things fixed or fastened to the premises thereby demised at any time during the term.” The lease of August, 1822, contained a covenant “to deliver up at the end of the term all fixtures and things which at any time during the term should be fixed or fastened in or upon the premises, or any part thereof.”

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COLLINGS.

While Godfrey and the plaintiff were in possession, and before the assignment was made to them by the assignees of the bankrupt, the defendant Collinge, who was an engineer and patent axle-tree manufacturer, entered into a treaty with them for an under-lease of part of the property ; and, being desirous of taking immediate possession, he requested Mr. Godfrey to accompany him with the leases to Mr. Watson, the defendant's solicitor, in order that the covenants in the leases might be examined, and the delay in preparing an abstract avoided. Mr. Godfrey did accordingly accompany the defendant to Mr. Watson's house, taking with him the leases ; and Mr. Watson, having examined the covenants, and adverted to that which prohibited particular trades, required, on the part of the defendant, a licence from the ground landlord to permit the defendant to carry on his business of an engineer and patent axle-tree manufacturer. Such licence was obtained from the ground landlord on the 24th of April, 1830, and on the *29th of the same month the defendant took possession of the premises for which he had contracted, having previously signed an agreement, approved by Godfrey and the plaintiff, in the form of a letter, as follows :

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“ To Messrs. Godfrey and Cosser.

“ GENTLEMEN,—I beg to say I am willing to take the lease of the premises in Bridge Road, Lambeth, lately occupied by Andrew Cosser, at the rent of 100*l.* per annum with 150*l.* premium, for the whole term you hold the same, short of ten days ; and also to take a small portion of ground where part of the shop stands belonging to Mr. Godfrey at 7*l.* per annum rent, to commence Midsummer Day next.

“ CHARLES COLLINGS.”

COSSER
v.
COLLINGE.

By an indenture dated the 4th of August, 1830, all the interest of Savill Godfrey in the premises, comprised in the lease of the 29th of May, 1824, was assigned by him to the plaintiff; and afterwards by an indenture, dated the 5th of August, 1830, the equity of redemption, and all other interest of the bankrupt in the premises, were assigned by the bankrupt and his assignees to the plaintiff, in pursuance of the before-mentioned resolution of the creditors.

The plaintiff informed the defendant that he was ready to grant alone a lease of the premises which the defendant had agreed to take from Godfrey and the plaintiff; and the defendant directed such lease to be proceeded with. A draft of the lease was accordingly prepared to which the defendant objected, on the ground that it contained the before-mentioned special covenants to insure, and to deliver up at the expiration of the term all new erections, structures, and improvements, and all other things fixed or fastened to the premises at any time during the term.

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The defendant's solicitor returned the draft with the following clause of exception introduced after the last-mentioned covenant: "Except, nevertheless, and always reserved to Charles Collinge, his executors, administrators, and assigns, the machinery, fixtures, and implements that are now or hereafter may be set up, affixed, or fastened to the said premises or any part thereof." The plaintiff insisted that he could only grant an under-lease with such covenants as were contained in the original lease, which covenants the defendant's solicitor had examined, and, with the exception of the covenant against particular trades, approved; and that as to the covenant to insure, the defendant was fully aware of it, and had actually insured the premises for 1,700*l*.

The bill was filed for the specific performance of the agreement. The defendant by his answer submitted that the covenants were unusual, and that he was not bound by them. He admitted that he had insured the property; but that the insurance was effected for his own security, and not by reason of his acquiescence in the special covenant to insure.

Mr. Savill Godfrey, in his evidence on the part of the plaintiff,

deposed to the circumstances which took place at the house of Mr. Watson, the defendant's solicitor, when he accompanied the defendant at his earnest request to have the deeds inspected, and said, he considered that Mr. Watson, as the defendant's legal adviser, had a full opportunity of becoming acquainted with the contents of the leases.

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Mr. Watson was examined on the part of the defendant, and deposed that he only cursorily examined the leases; that he advised the defendant not to take a lease, until the lessors, who were only mortgagees, had obtained the equity of redemption, and their title had been *further investigated; that, his attention being directed to the covenant prohibiting particular trades, among which was that of a smith, he apprehended that the defendant's trade would come under that prohibition, and that he thereupon stated his opinion that the landlord's consent to the carrying on of the defendant's trade upon the premises must be obtained before the defendant could enter into any agreement for taking a lease; and that it was distinctly agreed and understood between the deponent and Savill Godfrey that, when the mortgagees' title was completed, and the landlord's licence obtained, the leases should be again brought to the deponent, that he might have an opportunity of investigating the title.

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Mr. Pemberton and Mr. Stuart, for the plaintiff.

Mr. Bickersteth and Mr. Beales, contra.

THE MASTER OF THE ROLLS:

The question in this case is, whether Mr. Collinge, the defendant, who agreed to take from the plaintiff an under-lease of certain premises, is to be bound by the covenants contained in the original lease. The question is first to be considered without reference to the evidence in this cause. On the 23rd of April, 1830, a treaty is entered into by Collinge with Mr. Godfrey and the plaintiff; and on the 26th of April, three days afterwards, he signs an agreement which binds him to take the under-lease, and a few days afterwards he enters into possession of the premises. If there were no evidence whatever other than the facts

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I have now stated, *primâ facie* a man who agrees to take an under-lease must know that he is to be bound by all the covenants contained in the original lease. It was the duty of Mr. Collinge to inform himself of the covenants which were *contained in the original lease (1), and if he enters and takes possession of the property, he is bound by those covenants.

So the question would have stood, if there had been no evidence. It is next to be considered upon the evidence, whether Mr. Collinge had direct or constructive notice of the nature of the covenants in the leases. Mr. Savill Godfrey says, that about the 25th of April, Collinge came to him and stated that he was desirous of entering into an agreement for an under-lease, and also to have immediate possession; and with a view to save the delay of making an abstract, he requested Mr. Godfrey, who was in possession of the leases, to accompany him to the house of Mr. Watson, the defendant's solicitor, in order that Mr. Watson might have an opportunity of examining those leases. An abstract would have contained a statement of the covenants, and it must be inferred that Mr. Watson performed his duty in examining the deeds, with a view to obviate the necessity of an abstract. Mr. Watson's evidence is not altogether consistent with the deposition of Mr. Godfrey; but in the main points it appears to me to be so far from contradicting Mr. Godfrey's evidence, that it is to be considered, looking to the general actions and conduct of men, as substantially confirming it.

I am clearly of opinion that Mr. Watson had either actual or constructive notice, because the deeds were brought to him for the purpose of ascertaining what, if he had used due diligence, he must have discovered. The plaintiff, therefore, is entitled to the specific performance which he asks; and as I think Mr. Watson might, with due diligence, have discovered what the covenants in the leases were, he is entitled to that specific performance with costs.

(1) It is the vendor's duty to disclose any restriction on his own title. The purchaser is not in a position to demand inspection of the

documents of title before signing the contract. *Re White and Smith's Contract*, '96, 1 Ch. 637, 65 L. J. Ch. 481, 74 L. T. 377.—O. A. S.

BRIGHT *v.* ROWE(1).

(3 Myl. & Keen, 316—324.)

1834.

March 14, 17.

Rolls Court.

LEACH, M.R.

[316]

A married woman, by a testamentary instrument made in execution of a power contained in her marriage settlement, gave 2,000*l.*, subject to the life interest of her husband, to trustees upon trust for the benefit of her child or children, to be equally divided between them, share and share alike; but in case the 2,000*l.* should become payable before her children, being sons, should have attained twenty-one, or, being daughters, should have attained that age or day of marriage, then in trust to invest and apply the interest to their maintenance and education, and when they should attain twenty-one or day of marriage, to pay to them their respective shares of the principal; and in case any of the children should happen to die before their portions should become payable, then the same should go and belong to the survivors or survivor of them.

The testatrix left a son and two daughters, all of whom had attained twenty-one at her decease. The son, and afterwards a daughter, died in the lifetime of their father:

Held, that, on the death of the father, the surviving daughter was entitled to the 2,000*l.* by survivorship, except as to that share of it which accrued to the deceased daughter upon the death of the son, which belonged to the representative of the deceased daughter (2).

By a settlement, dated the 16th of April, 1788, and made previously to the marriage of John Rowe and Mary Clarke, a sum of 2,000*l.* was vested in trustees, to be placed out in the public funds, or on good security, upon trust to pay the interest and dividends thereof to the husband for his life, and after his decease, in case the said Mary, his intended wife, should happen to survive him, upon trust to pay and apply the principal money and interest for the only proper use and benefit of the said Mary Clarke, her executors and administrators; but in case she should happen to die in the lifetime of John Rowe, her intended husband, then in trust for such person or persons as she should by deed or will appoint, and in default of appointment, for her executors and administrators.

The marriage took effect, and in October, 1789, Mrs. Rowe, having then given birth to a daughter, Mary Elizabeth, in pursuance of the power reserved by the settlement, executed a testamentary instrument, by which she appointed the sum of

(1) *In re Hamlet* (1888) 39 Ch. Div. 426, 58 L. J. Ch. 242, 59 L. T. 745.

(2) According to the rule in *Cripps v. Wolcott*, 20 R. R. 268 (4 Madd. 11),

the survivorship should have been referred to the period of payment, i.e. the death of the father.—O. A. S.

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[*317]

2,000*l.* to two trustees, and the survivor, &c. upon trust, for the only use and benefit of her daughter, Mary Elizabeth Rowe, or any *other child or children, whether son or sons, daughter or daughters, which she might thereafter happen to have by her husband, John Rowe, to be equally divided between them, share and share alike ; but it was her will and intention, and she did thereby direct, that in case the said sum of 2,000*l.* should become payable before her said daughter Mary Elizabeth should have attained her age of twenty-one years, or day of marriage, or before any other of her children, being a son, should have attained the like age, or, being a daughter or daughters, the same age or day of marriage, then the trustees, or the survivor, &c. should place and lend out the same or such proportions thereof as should belong to any such children at interest on good security, or invest the same in the public funds, and pay and apply the interest and dividends and produce of each child's respective share thereof for and towards his or her better maintenance and education ; and when any such children, being sons, should attain the age of twenty-one years, or, being daughters, the like age or day of marriage, upon trust to pay to them their respective shares of the principal, with the unapplied interest ; and in case her said daughter Mary Elizabeth, or any other child she might thereafter happen to have by the said John Rowe, her husband, should happen to die before her, his, or their portion or portions of the said 2,000*l.* should become payable, then the same should respectively go and belong to the survivors or survivor of them, and to, for, or upon no other trust, intent, or purpose whatsoever.

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Mrs. Rowe died on the 3rd of October, 1825, leaving three children, issue of the marriage, surviving her, Mary Elizabeth, John, and Eliza Clarke Rowe, who had severally attained the age of twenty-one. John died in 1826, and Mary Elizabeth in 1829, both in the lifetime *of their father, who died in 1833, leaving one child only, Eliza Clarke Rowe, surviving him.

The bill was filed by the husband and administrator of the deceased daughter, Mary Elizabeth Rowe, against the trustees of the settlement, the surviving daughter, and representatives of the deceased son ; and the question was, whether the plaintiff was

entitled to any and what part of the 2,000*l.*, or whether the whole of that sum vested in the defendant, Eliza Clarke Rowe, by survivorship.

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Mr. Tinney and *Mr. R. Perry*, for the plaintiff [cited *Emperor v. Rolfe* (1), *Hope v. Lord Clifden* (2), *Jefferies v. Reynous* (3), *Schenck v. Legh* (4), *Powis v. Burdett* (5), *King v. Hake* (6).] The whole turns here, as in the case of *Hallifax v. Wilson* (7), upon the meaning of the word “payable.” * * Here the word “payable” is used in the sense equivalent to “vested;” and is referred much more obviously and naturally to the period of payment or vesting which she had just fixed, namely, the age of twenty-one or marriage, than to the period of the death of the tenants for life. It cannot, at any rate, be said that there is in this will a clear, unambiguous intention to make the right of the children to their portions depend upon their surviving both parents, and unless there is such a clear, unambiguous intention, the Court will give effect to what must always be presumed to be the natural intention of parents in favour of their children: *Hougrare v. Cartier* (8), *Perfect v. Lord Curzon* (9).

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Mr. Jacob, for the defendants in the same interest with the plaintiff.

Mr. Campbell, contra :

There is no ambiguity in the use of the word “payable” in this instrument, for it clearly refers to the period at which both parents shall have died, and it is expressly distinguished from the provision for payment *at twenty-one or marriage, which was only to take place in case of the death of the parents before their sons should have attained twenty-one, or the daughters should have attained that age, or married. * * The recent case of *Crowder v. Stone* (10) bears a strong analogy to the present. * * *

[*321]

(1) 1 Ves. Sen. 208.

(2) 5 R. R. 364 (6 Ves. 499).

(3) Cited 7 R. R. 206 (9 Ves. 311).

(4) 7 R. R. 199 (9 Ves. 300).

(5) 7 R. R. 259 (9 Ves. 428).

(6) 7 R. R. 266 (9 Ves. 438).

(7) 10 R. R. 146 (16 Ves. 168).

(8) 13 R. R. 142 (3 V. & B. 79).

(9) 21 R. R. 331 (5 Madd. 442);

and see other cases collected in *Franklin v. Lay*, 23 R. R. 215 (6 Madd. 258).

(10) 27 R. R. 68 (3 Russ. 217).

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Mr. Tinney, in reply :

[*322]

Crowder v. Stone has no application to the present case, because it does not belong to the class of cases between parent and child. If, however, the Court should be of opinion that the claim of the plaintiff to an interest in one-third share of the 2,000*l.* cannot be sustained, and that the present case falls within the principle upon which *Crowder v. Stone* was decided, then *the plaintiff, whose wife survived her brother John Rowe, will at least be entitled to the benefit of the rule as to accruing shares which is laid down in *Rudge v. Barker* (1) and *Ex parte West* (2), and which was followed in *Crowder v. Stone*.

THE MASTER OF THE ROLLS :

The rule being that, when a testator has unequivocally expressed an intention that a provision to be made for his children shall depend upon their surviving both their parents, the Court must give effect to that intention, and can only lean to the presumption in favour of children, where the intention of the testator is ambiguously expressed. The single question for consideration in this case is, whether, upon the whole will, the testatrix has or has not clearly and unambiguously expressed her intention in that respect. The expressions of the testatrix are not to be subjected to any violence for the purpose of raising an implication in favour of the children; but the ambiguity must appear obviously upon the face of the will.

[*323]

Mrs. Rowe having by her marriage settlement a power of appointing the principal sum of 2,000*l.* at the decease of her husband, if he should survive her, by a testamentary instrument directed that sum to be equally divided between the only child she then had, and any other child or children she might thereafter have by her husband. She considered that she might die, leaving these children under the age of twenty-one, or, being daughters, unmarried; and she therefore directed that, if the 2,000*l.* should become payable when the child then living, or any other child or children should be under *twenty-one or unmarried, the trustees should apply the proportions of such children for their maintenance and education until they should attain

(1) Cas. t. Talb. 124.

(2) 1 Br. C. C. 575.

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*
ROWE.

twenty-one or marry, when their shares were to be paid to them. So far there is a clear direction that the shares shall vest in the children at twenty-one, or marriage. But she also foresaw that another event might happen, namely, that the children, or some of them, might not be living at the time of the death of the husband; and she provides for that event by directing that, if her daughter who was then living, or any child or children she might thereafter have, should die before their portions of the 2,000*l.* became payable, then the same should go and belong to the survivors or survivor of them. I can see no ambiguity whatever here; but I am clearly of opinion that, by dying before their portions become payable, the testatrix meant, dying in the lifetime of the husband; and that the shares of the children so dying are given to the survivors or survivor of them.

With respect to the share which accrued by survivorship to the deceased daughter on the death of her brother John, there is certainly a class of cases according to which it has been decided, that the accruing shares shall not go to the survivors or survivor with the original shares; and therefore let it be declared, that the moiety of the brother's share which went to the deceased daughter by accruer belongs to the plaintiff, as her personal representative.

* * * * *

WHITTON *v.* PEACOCK.

(3 Myl. & Keen, 325—338.)

1834.
March 14.
May 23.
—
Rolls Court.
LEACH, M.R.
[325]

The surrenderee of a copyhold is an assignee of a reversion within the statute of 32 Hen. VIII. c. 34, and may maintain an action of covenant upon a lease made by his surrenderor, and the defendant in such action cannot protect himself by alleging the invalidity of the lease.

The lord of the manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years.

A lessee cannot dispute the validity of the lease under which he holds property, but his assign may dispute the claim of the assignee of the reversion to sue on the covenant of the lease on the ground that the original lessor had not acquired the legal ownership of the property when he made the lease.

THE bill was filed to enforce the specific performance of a contract for the purchase, by the defendant from the plaintiff

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of certain copyhold premises, being lots 2, 3, and 4 in the particular of sale described, held of the manor of Hornsey, of which manor the Bishop of London, in right of his see, was the lord. On the application of the plaintiff, an order was made in the usual form, directing the Master to inquire and state whether the plaintiff could make a good title to the premises contracted to be sold.

It appeared from the abstract that in November, 1732, one Joseph Storey, who was then seised in fee of a close of pasture called Hornsey Lane Field, being the copyhold premises in question, duly surrendered the same to Elizabeth Bennett by way of mortgage, to secure a sum of 400*l.* and interest. In the month of April, 1753, the mortgage money still remaining unpaid, Elizabeth Bennett completed her legal title as mortgagee, by obtaining admittance upon that surrender, the equity of redemption having at the time become vested in Samuel Storey, the son of the aforesaid Joseph Storey. Elizabeth Bennett died some time previous to the month of March, 1755, having, by her will, dated the 18th of June, 1753, devised the premises to her nephew, Bennett Gerrard, in fee, but without having surrendered them to the use of her will. Bennett Gerrard and Samuel Storey, on the 15th March, 1755, joined in surrendering the premises *to Bendal Martyn in fee, who on the same day was admitted tenant, and thereupon made a surrender of the premises to the use of his will.

[*326]

On the 11th of March, 1761, the lord of the manor of Hornsey granted licence to Bendal Martyn to demise the close in question, or any part thereof, from Christmas, 1760, for ninety-nine years, the said premises being intended to be improved by building, or for any less term. Bendal Martyn died soon afterwards, without having executed any lease of the premises, and by his will, dated the 25th of March, 1760, gave and devised the same unto Maria, the wife of Baker John Littlehales, in fee. On the 13th of April, 1762, Maria Littlehales was admitted tenant of the premises, and she and her husband, on the same day, surrendered them to the use of Baker John Littlehales in fee, who was thereupon admitted tenant.

By indenture of lease, dated the 2nd of August, 1762, made

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between Baker John Littlehales of the one part, and Philip Keys, builder, of the other part, it was witnessed that Baker John Littlehales and Maria his wife, in pursuance and part performance of an agreement dated the 18th of March, 1761, made between Bendal Martyn and Philip Keys, and by virtue of the aforesaid licence by Bendal Martyn obtained of the lord of the manor for that purpose, demised unto Philip Keys, his executors, administrators, and assigns, a piece of ground, parcel of the said premises, to hold the same to him, his executors, administrators, and assigns, from Lady Day, 1761, for ninety-eight years thence next ensuing, Philip Keys, his executors, &c. paying to B. J. Littlehales, his heirs and assigns, for the first two years, the rent of 1*l.*, and for the remaining ninety-six years the annual rent of 5*l.*; and Philip Keys thereby covenanted for himself, his executors, administrators, and assigns, that he, *his executors, administrators, or assigns, would, within six calendar months from the date thereof, complete and finish, fit for habitation, the messuage, tenement, buildings, and erections then standing on the premises thereby demised, and sufficiently repair and uphold the same during the term. By another indenture of lease of the same date, and executed by the same parties, B. J. Littlehales and Maria his wife, in pursuance of the said licence, demised another piece of ground, parcel of the said premises, for a similar term, at a like yearly rent of 5*l.*, and under covenants similar in every respect to those contained in the before-mentioned lease.

[*327]

On the 23rd of May, 1770, Martha Leigh, who was the niece and customary heir of Elizabeth Bennett, and upon whom the title to the copyhold premises had devolved in consequence of Elizabeth Bennett not having surrendered them to the use of her will, was admitted tenant of the premises, to hold the same in fee; and in the month of February, 1772, Martha Leigh and her husband Peter Leigh surrendered the premises to the use of B. J. Littlehales in fee, who was thereupon admitted tenant accordingly.

By an indenture of lease, dated the 3rd of July, 1773, made between B. J. Littlehales and Maria his wife of the one part, and the said Philip Keys of the other part, reciting the aforesaid

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two indentures of lease of the 2nd of August, 1762, and that the parties thereto had come to a further agreement respecting the said Hornsey Lane Field, whereby they had agreed that the said Philip Keys should have the whole of the said field leased to him at the yearly rent of 10*l.* only, and that, instead of cancelling the two former leases already granted of part thereof, the same leases should remain, *and another lease be granted of the residue of the said field, at the yearly ground-rent of 10*l.*, which should be considered the same as the two several rents of 5*l.* each reserved by the said two leases, and that, notwithstanding such several reservations, no more than the yearly rent of 10*l.* in the whole should be payable for the said field and the messuages or tenements erected thereon, it was witnessed that in pursuance of the said agreement, and by virtue of the said licence, and in consideration of the yearly rent and covenants thereafter reserved, the said B. J. Littlehales and Maria his wife did demise, lease, and to farm let unto the said Philip Keys, his executors, &c. the said Hornsey Lane Field, except such parts thereof as had already been demised to him by the two several indentures aforesaid, to hold the same with the appurtenances unto the said Philip Keys, his executors, &c., from Lady Day, 1761, for the term of ninety-eight years then next ensuing, paying for the first two years the rent of a pepper-corn, and for the remaining ninety-six years the yearly rent of 10*l.* unto the said B. J. Littlehales, his heirs and assigns; and Philip Keys thereby for himself, his executors, administrators, and assigns, covenanted with B. J. Littlehales, his heirs and assigns, that he the said Philip Keys, his executors, administrators, and assigns, would pay the said yearly rent of 10*l.* in the manner and at the times therein mentioned, and would also well and sufficiently repair and uphold the premises thereby demised, and every part thereof, as also all the messuages, tenements, or buildings which then were or might be erected thereupon, with the usual clause of re-entry on default; and the indenture contained a proviso that the yearly rent of 10*l.* thereby reserved was intended to be and was the same as the two several yearly rents of 5*l.* each, so respectively reserved by the two several indentures of lease before-mentioned.

By various subsequent surrenders and admittances, the customary estate of inheritance of B. J. Littlehales and Maria his wife became vested in the plaintiff in fee.

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No distinct evidence was adduced before the Master with respect to the existence or contents of the indenture of lease of the 3rd of July, 1773, and the indenture itself was not forthcoming; but in other respects the plaintiff's title was clearly deduced in the manner already stated; and the Master having thereupon reported in favour of the title, the defendant took one general exception to the report, and specified five objections as the grounds of the exception. Of these objections, the first was founded on the insufficiency of the evidence as to the existence and contents of the lease of the 3rd of July, 1773, and the rest, on the alleged invalidity of that and the two preceding leases of the 2nd of August, 1762, to which the copyhold premises were subject [the principal objection being that the licence was a mere personal authority to the copyhold tenant, and that the leases were consequently invalid, and that the benefit of the covenants by the lessee would not pass to the surrenderee of the lessor even if the leases had been authorized by the licence; because the surrenderee did not claim by assignment, and also because (in this particular case) the lessor was not legally entitled to the copyhold interest when the two leases of 1762 were made].

Mr. Pemberton and *Mr. Coote*, in support of the exception. * * *

[331]

Mr. Bickersteth and *Mr. Wigram*, for the vendor [cited *Doe v. Hellier* (1), to shew that any question as to the validity of the leases was barred by lapse of time. They also cited *Glover v. Cope* (2), which ruled that the surrenderee of a copyhold was within the equity of the statute of Hen. VIII.].

[333]

Mr. Pemberton, in reply.

[334]

THE MASTER OF THE ROLLS:

The material objection of the purchaser in this case is founded upon a doubt, whether he will be able to maintain actions of

(1) 1 R. R. 680 (3 T. R. 162).

(2) 4 Mod. 80; 3 Lev. 326.

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[*335]

covenant on the three leases to which the premises intended to be purchased by him are subject. The case of *Glover v. Cope* has established, that the surrenderee of a copyhold is the assignee of a reversion within the statute of 32 Hen. VIII., *and can therefore maintain actions on the covenants in a lease made by his predecessor. But it is argued that the leases in question are invalid, and that the doctrine in *Glover v. Cope* has reference only to a valid lease. If it were admitted that these leases were invalid, that would be altogether immaterial, for it would be against all principle that a lessee should be permitted to defend himself against an action of covenant by the lessor or the assignee of the reversion, by alleging a defect in the title of the lessor; more especially in this case, where, if these leases were illegal, the lessee must be taken to have had full notice of the defect of the licence under which the leases were granted, and of the consequent illegality. I concur in the opinion expressed by Lord KENYON in *Doe v. Hellier* (1), that the Statute of Limitations, which operates as a bar to other rights of entry after twenty years, would bar the lord in this case; and I am consequently of opinion, that the lord could not, at this distance of time, enter for a forfeiture if the leases were invalid.

With these views of the case, it is scarcely necessary for me to express any opinion as to the validity or invalidity of the leases. The first two leases are unobjectionable upon any ground, being building leases, and granted in consequence of contracts with the copyholder who obtained the licence; and as to the third, I have no doubt that, by the custom of this manor, and probably of most other manors, the personal licence to the copyholder runs with the land, and I cannot consider that the licence was given upon condition that building leases only should be granted under it.

[*336] I must, therefore, overrule the exception as far as regards the last four objections to the title; but, being *of opinion that the vendor is bound to supply the evidence upon the insufficiency of which the first objection stated in the exception is grounded, I shall allow the exception so far as it applies to that point. As the excepting party, however, has succeeded upon one only

(1) 1 R. R. 680 (3 T. R. 162).

of his objections, and that forming comparatively but a small part of the exceptions, and has failed upon all the rest, I shall direct the deposit to be divided.

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Shortly afterwards, the objection founded on the insufficiency of the evidence of the existence and contents of the lease of the 3rd of July, 1773, was removed by the discovery and production of the original lease itself.

May 23.

The plaintiff then presented a petition stating that fact, and praying that the defendant might be decreed specifically to perform his agreement. The defendant at the same time presented a cross-petition, submitting that his exception to the title ought to have been allowed, not only upon the first ground, but also as regarded the objection which alleged that, from the circumstance of the legal title to the copyholds being outstanding in Martha Leigh at the time of the granting of the two leases of the 2nd of August, 1762, by B. J. Littlehales, and being got in by B. J. Littlehales in the year 1772, the reversion in such leases would not pass by the surrenders made by the co-heirs of B. J. Littlehales (under whom the plaintiff claimed), so as to give to the surrenderees the benefit of the covenants and conditions contained in those leases. The petition therefore prayed that, with reference to the last-mentioned objection, the exception might be reheard. The two petitions were brought to a hearing together.

Mr. Pemberton, for the purchaser. * * *

[337]

Mr. Bickersteth and *Mr. Wigram*, *contra* [contended that the leases of August, 1762, were certainly good by estoppel against the lessee and his assigns; and at any rate they were altogether merged in, or rather were absolutely confirmed by, the lease of July, 1773, which was executed by Littlehales to the same lessee after the legal estate had been got in].

The MASTER OF THE ROLLS said that, if the purchaser chose, he should direct a case confined to the single point raised by his petition; and the purchaser having elected to take it, a case was accordingly stated for the opinion of the Court of Common Pleas.

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The case set out the title of the plaintiff as it has been already stated (1), and the question for the opinion of the Court was, "whether the plaintiff can maintain an action of covenant against the assigns of Philip Keys for breach of the covenants contained in the leases of the 2nd of August, 1762, or either of them."

The following Certificate has since been returned (2):

"We have heard this case argued by counsel, and have considered it; and we think the plaintiff cannot maintain an action of covenant against the assigns of Philip Keys for breach of the covenants contained in either of the leases of the 2nd of August, 1762.

"N. C. TINDAL,
"J. A. PARK,
"S. GASELEE,
"J. VAUGHAN."

1834.
May 2, 5.

Rolls Court.
LEACH, M.R.
[344]

ATTORNEY-GENERAL v. CHRIST'S HOSPITAL.

(3 Myl. & Keen, 344—346.)

Previously to 3 & 4 Will. IV. c. 27, length of possession did not prevail against charitable trusts, where the land was purchased with notice of the trusts.

THIS information was filed on behalf of the parish of St. Andrew Undershaft, in the city of London, at the relation of certain inhabitants of the parish, for the purpose of recovering a messuage and piece of land in the county of Essex from the governors of Christ's Hospital.

The case stated in the information was, that in the year 1620, one Robert Bucke, a citizen of London, bequeathed the sum of 100*l.* upon certain charitable trusts for the benefit of poor persons belonging to the parish of St. Andrew Undershaft; and that, shortly after his decease, his widow having added another sum of similar amount to the charity, the whole, together with 45*l.* contributed out of the parish-chest, was, a few years afterwards, laid out in the purchase of the messuage and land in question, and the conveyance taken in the names of certain of

(1) *Supra*, pp. 80, 83.

(2) The hearing in the C. P. is

reported 2 Bing. N. C. 411; 2 Scott,

630.

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the parishioners, who were described in the deed of conveyance as feoffees of the charity. In the year 1677, a person named Forster bought the property from the then feoffees at the price of 140*l*. Forster soon afterwards devised it by his will to the governors of Christ's Hospital; and that institution had continued in the undisturbed enjoyment of the rents and profits from the year 1680 to the present time.

Mr. Pemberton and *Mr. Hall*, for the relators, argued that, in a court of equity, Christ's Hospital must be held to have received distinct notice that the property had been devoted by the donors to a particular charity, and *could not be sold without a breach of trust. The conveyance to Forster, in which the conveying parties were described as feoffees for the parish, was of itself sufficient to fix him, and of course all volunteers claiming under him, with notice of the charitable trust impressed upon the property; and the presumption was that, as the hospital had declined to produce the deed, its contents, if produced, would fortify the inference drawn from this description.

[*345]

Mr. Bickersteth and *Mr. Phillimore*, for the defendants, the governors of Christ's Hospital, submitted that after 150 years of undisturbed possession, it would be dangerous and unjust to deprive one charity of its property merely for the purpose of transferring it to another charity. * * The consideration expressed to be paid upon the sale had [presumably] in some way or other been applied for the benefit of the parishioners, although the exact application of it could not now be traced.

May 5.
—

The title-deeds of the property, which were in the hands of the defendants, were eventually produced, and it appeared, on inspecting them, that the surviving feoffees who had sold the land in question in *the year 1677 for 140*l*., as well as the person to whom the land was then conveyed, had full notice upon the face of the conveyance that the land sold was held by the parties conveying in trust for the benefit of the poor of the parish; and that, although the sale was stated to be made under an order of the vestry, so that wilful fraud or concealment could not be imputed to the feoffees, there was no evidence

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v.
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HOSPITAL.

whatever that the proceeds of the sale had been applied to the purposes of the charity, or to any other charitable purpose.

THE MASTER OF THE ROLLS:

If, consistently with the facts proved in this case, it were possible to presume a state of circumstances which would render the conveyance to Forster a legal transaction, and not a breach of trust, I should, after this great length of time, consider it to be my duty to raise such presumption; but that not being possible, the defendants, the governors of Christ's Hospital must reconvey the land upon the trusts expressed by the donors of the money with which the land was purchased.

His Honour was at first inclined to direct that the sum of 140*l.*, the amount of the purchase money, should be refunded by the parish, and paid to the defendants for the benefit of Christ's Hospital. It appeared, however, on inquiry, that rents and profits to the value of 40*l.* had been for many years annually received by that institution out of the estate, and that no account of such receipts was sought by the information. His Honour was therefore of opinion that the defendants had no equity to call upon the parish to refund the money paid on the sale of the estate.

1834.
June 6.

Rolls Court.
LEACH, M.R.
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OWEN v. THOMAS (1).

(3 Myl. & Keen, 353—357; S. C. 3 L. J. (N. S.) Ch. 205.)

An agreement in writing for the sale of a house, referred to the deeds as being in the possession of a person named in the agreement, but did not describe or identify the house. The Court held the agreement sufficiently certain, if it could be ascertained, by an inquiry before the Master, that the deeds in the possession of the person named referred to the house in question.

THE defendant, who was possessed of a leasehold house at Newport, in Monmouthshire, entered into a parol agreement for the sale of the house to the plaintiff at the price of 1,000 guineas. As soon as the agreement was concluded, the plaintiff, by the direction of the defendant, wrote and sent by post to Mr. Church,

(1) *M. Murray v. Spicer* (1868) L. R. 5 Eq. 527, 37 L. J. Ch. 505, 18 L. T. 116.

the defendant's solicitor, the following letter, to which the defendant, having previously read it over, affixed his signature :
 "To Samuel Church, Esq., Brecon. Aber, 7th of February, 1828. DEAR SIR, I have this day sold the house, &c. in Newport, to Mr. John Owen for 1,000 guineas, and I am to receive the next half year's rent; the money to be paid as soon as the deeds can be had from Mr. Deere; and you will be pleased to lose no time in getting them from him. I am, &c.,
 ROWLAND THOMAS."

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The bill was filed by the purchaser against the vendor for a specific performance of this agreement; and the defendant having died before putting in an answer, the suit was revived against his wife and personal representative.

The wife, by her answer, set up a case of fraud and imposition on the part of the plaintiff, but went into no evidence. In support of the bill the only evidence adduced was the before-stated letter, which was admitted.

Mr. Bickersteth and *Mr. Lynch*, for the plaintiff, submitted that the defendant's letter to his solicitor, being signed by him, was sufficient evidence of an *agreement within the Statute of Frauds. * * It was not necessary that the agreement should be signed by the party who sought to enforce it: *Boys v. Ayerst* (1), *Palmer v. Scott* (2), *Fowle v. Freeman* (3).

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Mr. Pemberton and *Mr. Richards*, *contrà* :

* * The language of the letter, assuming it to amount to an agreement within the Statute of Frauds, is far too vague in its terms for the Court to act upon: it neither specifies the subject of the sale, nor the quantity of interest to be conveyed. * * There is nothing to shew that this letter was sent to the solicitor for the purpose of evidencing the contract; nor has it even been proved that, before it was sent off, its contents were communicated to the plaintiff.

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Mr. Bickersteth, in reply. * * *

(1) 23 R. R. 224 (6 Madd. 316).

391).

(2) 32 R. R. 229 (1 Russ. & Myl.

(3) 7 R. R. 219 (9 Ves. 351).

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THE MASTER OF THE ROLLS :

This letter from Rowland Thomas to his solicitor was written to apprise him of the agreement into which he had entered with the plaintiff, in order that the solicitor might take the necessary measures to carry it into execution, and is a sufficient memorandum or note of the agreement in writing within the Statute of Frauds. It is true that the agreement must be certain in its terms; but *id certum est quod certum reddi potest*. It appears, upon the face of the agreement, that the house referred to is the house of which the deeds were in the possession of Mr. Deere, and the house might easily be ascertained before the Master. The defendant, however, having declined the inquiry, in effect admits that any uncertainty as to the subject of the agreement would be thereby removed and the plaintiff is therefore entitled to the decree which he asks.



KNIGHT v. DAVIS.

(3 Myl. & Keen, 358—361; S. C. 3 L. J. (N. S.) Ch. 81.) (1)

1833.
Nov. 21.
Rolls Court.
LEACH, M.R.
[358]

A specific legatee whose legacy has been mortgaged or pledged by the testator is entitled to have the same redeemed and exonerated at the expense of the testator's general personal estate.

[In this case the law upon this point is thus laid down by the MASTER OF THE ROLLS, who said:]

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Where a specific legacy is pledged by the testator, the specific legatee is entitled to have his specific legacy redeemed; and, if the executor fail to perform that duty, the specific legatee is entitled to compensation, to the amount of the legacy, against the general assets of the testator. The rule borrowed from the civil law is, that a specific legatee, if his legacy is charged with a mortgage or other charge, is entitled to have the charge paid off by the executor out of the general assets of the testator; and, if that be not done, he is entitled to stand in the same situation as if the duty of the executor had been performed. * * *

(1) *Bothamley v. Sherson* (1875) L. R. 20 Eq. 304, 314.

FOURDRIN *v.* GOWDEY (1).

(3 Myl. & Keen, 383—410; S. C. 3 L. J. (N. S.) Ch. 171.)

A testator by his will directed all his property to be sold and converted into money, and after charging this mixed fund with his debts and legacies, gave the residue to aliens resident abroad, one of whom was his heir-at-law: Held, that the rule which is applicable to charitable bequests was applicable in such a case; that the interest in land and the pure personal estate must respectively be valued and bear their proportions of the debts and legacies; and that the residue of the interest in land belonged to the Crown, and the residue of the pure personal estate to the aliens (2).

A testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of 100*l.* to J., and another of 100*l.* to M., who was a married woman, to her separate use, independent of her husband; and it was left to his discretion either to pay the charges in his lifetime or to direct them to be paid by his executors. He did not pay them in his lifetime; but amongst other legacies which by his will he directed his executors to pay, was a sum of 500*l.* to J., and a sum of 100*l.* to M. not limited to her separate use: Held, that the sum of 100*l.* given to J. by the appointment of the wife, was satisfied by the 500*l.* bequeathed by the testator; and that the sum of 100*l.* bequeathed to M. was in addition to, and not a satisfaction of, the 100*l.* given to her separate use by the wife.

[MRS. FOURDRIN, by her will, among other legacies, gave] to her daughter-in-law, Mary Ann Myers, 100*l.*, "to be paid to her for her sole use, upon her separate receipt and independent of her husband;" and to her sister's daughter, Anna Jewitt, she gave 100*l.*; and by a clause at the end of the will, she left it entirely at her husband's discretion, either to pay her legacies during his lifetime, or to direct them to be paid by his executors after his decease. Francis Fourdrin the husband, who was her residuary legatee, continued after her death in possession and enjoyment of all the property which his wife had bequeathed to him, but did not pay any of her pecuniary legacies. By his will, made after his wife's decease, he directed his executors to pay, among other legacies, to Anna Jewitt, daughter of his late wife's sister,

(1) *Fairer v. Park* (1876) 3 Ch. D. 309, 45 L. J. Ch. 760, 35 L. T. 27.

(2) The Naturalization Act, 1870, s. 2, enables aliens to acquire and hold real estate, and has made it unnecessary to retain so much of this report as dealt with the ques-

tion referred to in this paragraph of the head-note. That portion of the case is explained and fully discussed by Lord COTTENHAM, L. C., in *Du Hourmelin v. Sheldon* (1839) 4 My. & Cr. at pp. 530, 532.—O. A. S.

1834.

March 13.

April 29.

May 1.

Rolls Court.

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500*l.*, and to Mary Ann Myers 100*l.*; and a question now arose, whether these bequests were a satisfaction of the sums respectively bequeathed to Anna Jewitt and Mary Ann Myers by his wife's will, or whether they were given in addition to those sums. Mary Ann Myers, at the time of the testator's death, continued under coverture.

Mr. Beames, for the plaintiff, insisted that the legacies given by the husband's will were a satisfaction of those to which the legatees were entitled under the will of the wife.

Mr. Lovat, for the legatees.

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The MASTER OF THE ROLLS said that this was a question not of satisfaction, but performance. The husband, by the condition on which he took the general residuary property of his wife, was bound either to pay these pecuniary legacies in his lifetime, or to provide for their payment after his death. He was clearly of opinion, that, by the bequest of 500*l.* to Anna Jewitt, the testator had performed his obligation, so far as her legacy was concerned. The question upon the other legacy was more nice, as the two legacies were of different characters; the one being given to the lady generally, and the other to her sole and separate use; and it would be satisfactory to have it further argued.

May 1.

The question was again argued by *Mr. Lovat*, on behalf of Mary Ann Myers; and the following authorities were referred to: *Blandy v. Widmore* (1), *Lee v. D'Aranda* (2), *Garthshore v. Chalie* (3), *Goldsmid v. Goldsmid* (4), *Wathen v. Smith* (5), *Adams v. Lavender* (6).

THE MASTER OF THE ROLLS :

This is a legacy of a different quality from the legacy given to Mrs. Myers by the will of the wife. I cannot annex to the latter a limitation different from that which the testatrix has herself annexed to it; and I think, therefore, that Mrs. Myers is entitled

(1) 1 P. Wms. 324.

(2) 1 Ves. Sen. 1.

(3) 7 R. R. 311 (10 Ves. 1).

(4) 18 R. R. 60 (1 Swan. 211).

(5) 20 R. R. 302 (4 Madd. 325).

(6) Macl. & Y. 41.

to both. Let it be declared, that the legacy of 500*l.* is a performance of the obligation on the testator to satisfy the legacy of 100*l.* given to Anna Jewitt; and that with respect to all the other legacies, they remain a charge upon the testator's estate.

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GOWDEY.

BLAND v. WILLIAMS.

(3 Myl. & Keen, 411—417; S. C. 3 L. J. (N. S.) Ch. 218.)

A gift over upon death under 24 and without issue may shew that a prior gift to take effect at 24 was intended to be vested and not contingent upon the attainment of that age.

1834.
June 3, 5.
Rolls Court.
LEACH, M.R.
[411]

THE residuary clause in the will of Samuel Meymott gave and bequeathed all the rest, residue, and remainder of his estate and effects to trustees upon trusts to convert the same into money, and after investing such money in the Government funds, or on good security, then upon trust to receive the rent, interest, dividends, and proceeds thereof, as the same should become due and payable, and thereout pay unto his daughter Elizabeth Sarah Bland, the wife of William Bland, for her life, a clear annuity of 300*l.* by equal half-yearly payments, to her sole and separate use. The testator then proceeded in these words: "And from and after the decease of my said daughter, upon trust to receive the said rent, interest, dividends, and proceeds of all my estate and effects, and to pay, apply, and dispose of the same, or a sufficient part thereof, for and towards the maintenance, education, and bringing up of all and every the child or children of my said daughter, until they shall severally and respectively attain their ages of twenty-four years; and when, and as they shall severally and respectively attain that age, then upon trust, to pay, assign, transfer, and convey all the said residue of my estate and effects, with the interest, dividends, and proceeds thereof, as shall not have been applied for and towards their maintenance, education, and bringing up, equally unto and amongst all her said children, when, and as they shall severally and respectively attain their said age of twenty-four years; and in case any or either of her said children shall happen to die before having attained that age, and without leaving lawful issue

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[*412]

of *his or her body, then in trust, to pay, assign, transfer, and convey all the said residue of my estate and effects unto such of her said children as shall live to attain his, her, or their respective ages of twenty-four years, share and share alike, if more than one, and if but one, then the whole to that one child ; and my will is, that the part or share of such of them as shall be a daughter or daughters, shall not be subject to the debts, control, or engagements of any husband or husbands she or they may marry. But in case all and every of her said children shall happen to die under that age and without leaving lawful issue, as aforesaid, then upon trust to pay the interest, dividends, and annual produce thereof unto my said son-in-law William Bland, if he shall be then living, for and during the term of his natural life ; and from and after his decease, in trust to pay, assign, transfer, and convey all the said residue of my said estate and effects, unto such person or persons as may be entitled thereto as my next of kin."

The testator died shortly after the execution of his will, and left his daughter, Elizabeth Sarah Bland, the wife of William Bland, his only next of kin.

The bill was filed by Mr. and Mrs. Bland against the trustees and executors of the will, and against their infant children ; and the material question in the cause, was, whether the interests limited to the children of the testator's daughter, Mrs. Bland, did not fail as being too remote, in which case such interests, being undisposed of, would vest in her as the testator's next of kin.

Mr. Pemberton and Mr. Girdlestone, sen., for the plaintiffs :

[*413] Upon the first part of the will, the bequest would clearly be contingent ; and the only doubt arises upon *the subsequent part of it, by which it is provided, that in case any of the daughter's children shall happen to die before they attain twenty-four, and without leaving lawful issue, the trustees shall hold the residuary estate in trust to transfer and convey it unto such of the children as shall live to that age ; but in case all the children shall die under that age, and without leaving lawful issue, then upon trust for the testator's son-in-law, for life, &c. These provisions seem to furnish an inference, that the children

who left issue were to take vested interests at all events, whether they attained the prescribed age or not. * * In *Leake v. Robinson* (1), the bequest over in case of death without issue did not occur, but in other respects that case resembled the present. [*Bull v. Pritchard* (2)] apparently proceeded upon *Leake v. Robinson*. In *Vawdry v. Geddes* (3), and *Judd v. Judd* (4) there was no limitation over upon the death of the prior takers without issue. * * *

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Mr. Bickersteth and *Mr. Teed*, for the executors.

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Mr. Wailes, for the children of Mrs. Bland:

* * None of the cases cited, with perhaps the exception of *Bull v. Pritchard*, in which the point was not taken, come up to the one now before the Court. In *Leake v. Robinson* there were expressions which clearly indicated that the testator looked to a future period as the time when the interests should vest, and that in the meantime they were to remain in contingency. In that case, however, Sir W. GRANT says, * * “Here interest is not given to children dying before twenty-five; children attaining twenty-five are to take the whole. There is not even a provision for the case of a child dying under twenty-five leaving issue; all is to go to those who do attain twenty-five. How is it possible, therefore, that a child can be said to have a vested interest before twenty-five, when it has neither a right of enjoyment, a capacity of transmission, or a ground of claim until after it shall have attained that age?” These observations, contrasted with the circumstances of the present case, have a direct bearing on the question before the Court, and strongly support the argument that the children took a vested interest in their shares, liable to be divested in the event of death under twenty-four without leaving issue, and that construction reconciles every part of the will.

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THE MASTER OF THE ROLLS:

Whether in a gift of this nature the time of vesting is postponed, or only the time of payment, depends altogether *upon

[*417]

(1) 16 R. R. 168 (2 Mer. 363).

203).

(2) 25 R. R. 27 (1 Russ. 213).

(4) 30 R. R. 203 (3 Sim. 525).

(3) 32 R. R. 196 (1 Russ. & Myl.

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the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age. In this case, the gift over is not simply upon the death under twenty-four, but, upon the death under twenty-four without leaving issue. If upon a death under twenty-four, at whatever age issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest with an executory devise over, in case of death under twenty-four, without leaving issue. All the cases upon the subject, except the one before Lord Gifford (1), are reconcilable with this distinction.

1833.
Nov. 9.

Rolls Court.
LEACH, M.R.
[426]

HALL v. HUTCHONS.

(3 Myl. & Keen, 426—428; S. C. 3 L. J. (N. S.) Ch. 45.)

In general, a release to the principal debtor is, in equity, a release to the surety; but if the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety.

THE bill was filed by a simple contract creditor against the defendant, James Hutchons, as personal representative of William Hall the younger. The usual decree and reference having been made, and the Master having, among other things, allowed a claim made on the part of the administratrix of William Gurney, deceased, against the estate of William Hall the younger, to the sum of 268*l.* 15*s.* and interest, an exception was taken by the defendant to that part of the Master's report. The claim was made under the following circumstances:

On the 15th of May, 1823, William Hall the elder, and William Hall the son, executed to William Gurney a warrant of attorney to confess judgment for the sum of 5,000*l.*, and upon that warrant of attorney judgment was entered up, subject to a defeazance, which recited that the judgment was to secure the payment of 3,150*l.* and interest, due from William Hall the elder to Gurney. William Hall the elder had previously accepted several bills of exchange by way of security for the debt; and

(1) *Bull v. Pritchard*, 25 R. R. 27 (1 Russ. 213).

among others a bill of exchange for the sum of 500*l.*, dated the 1st of January, 1823, and payable thirty-three months after date.

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In September, 1824, William Gurney died intestate, and his daughter, Ann Barton, took out administration of his estate and effects. When the bill for 500*l.* became due, William Hall the younger made a proposal to Robert Barton, the solicitor of Ann Barton, to pay 300*l.* in part payment, and to give the joint acceptance of *himself and his brother, Charles Barton, for the remainder of the principal and interest at three months. The bill given upon this occasion was indorsed by Robert Barton to Messrs. Henderby and Son for valuable consideration, and, not being paid when it became due, it was renewed by a bill for the same amount, accepted by the same parties, and made payable in one month; and the renewed bill was also indorsed over to Messrs. Henderby and Son, all interest due upon the former bill having been paid by William Hall the younger.

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By an indenture, dated the 11th of April, 1826, William Hall the elder assigned to Robert Barton and two other trustees, and the survivor, &c. all his effects upon certain trusts for the benefit of his creditors; and the indenture further witnessed, that in pursuance of the agreement in that behalf, and in consideration of the covenants and agreements thereinbefore contained on the part of William Hall the elder, the several creditors, parties to the said indenture, did fully and absolutely release, acquit, and discharge William Hall the elder, his heirs, executors, and administrators, of and from all and every the debts and sums of money then due and owing from him, William Hall the elder, to the several creditors, parties thereto, or any of them, and of and from all accounts and reckonings whatsoever, then subsisting between them or any of them and William Hall the elder; and of and from all and all manner of actions and suits, cause and causes of action and suit, judgments, executions, bills, bonds, notes, claims, and demands whatsoever at law and in equity. And it was by the said indenture expressly agreed and declared between and by the parties thereto, that the executing the same by any person or persons who was or were a creditor or creditors of the said William Hall the elder should not annul, affect, or prejudice any deed or deeds,

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security *or securities, which such creditor or creditors had then or theretofore for his, her, or their debt or debts, or the payment thereof or any part thereof.

This deed was executed by Robert Barton, on behalf of Ann Barton, the administratrix of Gurney, and in the schedule to the deed the sum of 1,750*l.* was set opposite to the name of Robert Barton, as the amount of his claim against William Hall the elder.

Mr. Pemberton, in support of the exception, contended that William Hall the younger had, by the transaction between him and the creditor, taken upon himself the debt of his father; and that the remainder of the debt for which he became liable was in no degree affected by the subsequent release of the creditor to William Hall the elder.

Mr. Bickersteth and *Mr. Chandless*, *contrà*, insisted that, although the acceptor of a bill of exchange was at law treated as the principal debtor, yet in equity he was considered only as a surety, and in that Court a release to the principal debtor was a release to the surety.

THE MASTER OF THE ROLLS:

Generally speaking, a release to the principal debtor is a release to the surety; but if the surety has, previously to the release given by the creditor, paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety for the remainder of the debt. I am of opinion, therefore, that the claim made against the estate of William Hall the younger was properly allowed by the Master.

Exception over-ruled.

1834.
March 21.

Rolls Court.
LEACH, M.R.
[445]

WAIN v. THE EARL OF EGMONT.

(3 Myl. & Keen, 445—449.)

Where in a trust deed for the satisfaction of debts, a discretion is vested in the trustees to refuse the benefit of that deed to any creditor, although his claim may be lawful, the Court cannot empower the Master to ascertain who are entitled to the benefit of the deed but if the

trustees have no such absolute discretion, no creditor can be entitled to the benefit of the deed, until he has submitted his claim to the investigation and allowance of the trustees, and they have allowed it; or unless upon such application the trustees have refused to act in the execution of the trusts.

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EGMONT.

THIS was a petition presented by three persons, claiming to be entitled, as creditors of the Earl of Egmont, to the benefit of a trust deed executed by the Earl of Egmont; and it prayed that the Master, by whom the claim of one of the petitioners had been disallowed, might be directed to review his report; and that he might proceed and report on the claims of the other petitioners.

By an indenture of release, dated the 2nd of November, 1824, and made between John, Earl of Egmont, of the first part, the several scheduled creditors of the Earl of Egmont for gross sums of money or for annuities not secured by judgments, who should execute the indenture, *of the second part, the several creditors for gross sums of money and annuities secured by judgments and other securities, of the third part, Henry Viscount Perceval, the only son of the Earl of Egmont, of the fourth part, the three trustees, of whom Viscount Perceval was one, of the fifth part, and Henry Coward Teed of the sixth part, the Earl of Egmont conveyed the manors, hereditaments, and premises therein described to the trustees, their heirs, and assigns, upon trust that the trustees and the survivors or survivor, &c. should sell and dispose of the same at their or his discretion, and apply the monies arising from such sale to the discharge, satisfaction, or composition of the debts and incumbrances due and owing from the Earl of Egmont, according to their several priorities, and in the manner therein mentioned. And it was by the said indenture provided and declared that no creditors of the Earl of Egmont by judgment, nor any person having a lien or charge upon the said manors, hereditaments, and premises thereby granted and released, should be entitled or allowed to execute the said indenture, until the amount of his debt or claim should be previously allowed, fixed, or ascertained by the trustees or trustee for the time being; and it was provided that it should be lawful for the trustees or trustee to sign and deliver to the several creditors debentures, or certificates of acknowledgment

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for the amount of their respective debts so allowed, settled, or compounded for; and that every creditor accepting such debenture should sign an agreement according to the form therein specified not to sue or molest the Earl of Egmont; and it was further provided that no creditor of the Earl of Egmont by specialty or simple contract, nor any person having a legal or equitable charge or lien upon the said manors, hereditaments, and premises should be entitled to any benefit under the said *indenture until he should receive such debenture and sign such acknowledgment as aforesaid.

The plaintiff was a creditor to the amount of 6,000*l.*, who had obtained a debenture from the trustees; and the bill was filed for the purpose of having the trusts of the deed carried into execution under the direction of the Court. By the decree at the hearing it was referred to the Master to take an account of the mortgage debts and incumbrances charged upon the estates comprised in the indenture of the 2nd of November, 1824, and of the debentures granted by the trustees, and of what was due to the plaintiff, and all other the creditors of the Earl of Egmont entitled to the benefit of the trusts of that indenture.

One of the petitioners, George Dobree, carried in a claim, as a judgment creditor, before the Master; but his claim was disallowed by the Master on the ground that it had not been investigated by the trustees, and that, as no debenture had been granted to him by the trustees, he was not entitled to the benefit of the trust deed.

The two other petitioners, being in the same situation in that respect with the petitioner whose claim had been rejected, declined to prosecute their claims before the Master.

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Mr. Bickersteth, Mr. Rolfe, and Mr. Jacob, for the petitioners, contended that, although the petitioners might not have been entitled to the benefit of the trusts of the deed of the 2nd of November, 1824, had the trustees carried the trusts into execution, the situation in which the petitioners stood was entirely altered, because the trustees had, as appeared upon their answer, refused to *execute the trusts of that deed, and had divested themselves of the discretion reposed in them. The

petitioners were clearly incumbrancers upon the estate, and as a trust could never fail from the refusal of a trustee to execute it, the Court would take care that the trusts of the deed of the 2nd of November were carried into execution, and that the petitioners were not deprived of the benefit to which they were entitled.

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EGMONT.

Mr. Pemberton and *Mr. Girdlestone, jun.,* *contrà*, insisted that there was no ground for inferring from the answer of the trustees that they refused to act; that the petitioners were excluded, by the express provisions of the trust-deed, from the benefit to which creditors who had obtained debentures were entitled; and that the Master was therefore right in disallowing their claims. The petition was irregular, for *Dobree* was the only one of the three petitioners whose claim had been adjudicated upon by the Master, and he should have excepted to the Master's report.

THE MASTER OF THE ROLLS:

If the trustees were authorised by this deed to refuse debentures at their discretion to any lawful creditors, it is plain that this Court could never take upon itself the exercise of such a discretion, nor grant power to the Master to ascertain the parties entitled to the benefit of this deed; and if the case were to turn upon that point, it would be necessary to enter into a more minute examination of the language of the deed than it has hitherto undergone. It appears to me, however, that if the trustees have not in the deed that extent of discretion, yet no creditor can be entitled to claim the benefit of the deed unless his debt has been investigated and allowed by the trustees, or unless the trustees have *refused to act. It is argued that the trustees in their answer do refuse to execute the trusts, but I do not collect that such is the effect of their answer. They state the circumstances which have impeded their progress in the execution of the trusts, but they all express themselves to be ready to act. The Court cannot, therefore, in the first instance direct the Master to review his report in respect of the claims of the petitioners.

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The petitioners must first submit those claims to the investigation and allowance of the trustees, and, if the trustees refuse

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 EGMONT.

to enter into that investigation, they will then be justified in an application to the Court; and if, upon such application, it shall appear, upon reference to the trust-deed, that the trustees have not an absolute discretion to reject any lawful claim, it will be the duty of the Court to authorise the Master to inquire into the debts of the petitioners.

1834.
 July 29, 30.
 Aug. 5.

WHARTON v. THE EARL OF DURHAM.

(3 Myl. & Keen, 472—484.)

[472]

[THE decision in this case was reversed on appeal to the House of Lords as reported in 3 Cl. & Fin. 146; 39 R. R. 13.]

1829.
 May 26.
 1830.
 May 24.
 Lord
 LYNDBURST.
 L.C.

HENCHMAN v. THE ATTORNEY-GENERAL (1).

(3 Myl. & Keen, 485—495.)

A devise of copyhold land in fee upon condition that the devisee, within one month, pay 2,000*l.* to the testator's executor, to be applied, after payment of debts and legacies, to charitable purposes.

The testator died without leaving any customary heir or next of kin.

Held, upon appeal, that the proportion of the 2,000*l.*, which was void by the Mortmain Act, was to be considered as real estate undisposed of, and that the devisee, and not the Crown, was entitled to it.

1834.
 May 23.
 Aug. 5.

Lord
 BROUGHAM,
 L.C.

[485]

JOHN GIRLING, by his will dated the 1st of April, 1798, devised certain copyhold lands to William Henchman (whom he appointed one of his executors), his heirs and assigns, upon condition that he, William Henchman, his heirs and assigns, should pay to Martin Harsant (whom he appointed his other executor), his executors or administrators, the sum of 2,000*l.*, and he desired that the same should be taken as part of his personal estate and disposed of in the same manner as was therein-after mentioned in case the same premises should be sold. But if William Henchman should, for the space of one month after his decease, refuse and decline to have and take the same premises *under the said devise, then, from and after such

(1) See now the Mortmain and Charitable Uses Act, 1891.—O. A. S.

refusal, he revoked the said devise, and he thereby from thenceforth empowered and authorised the said William Henchman and Martin Harsant, or the survivor of them, or the executors or administrators of the survivor of them, to sell and dispose of the said copyhold lands, at longest within six months next after his decease, for the best price that could be got for the same; and the monies arising therefrom, and from the rents and profits thereof, in the meantime, until such sale, together with his ready money and securities for money, after payment of his just debts, funeral expenses, the said legacy, and the other charges and expenses incident to the execution of his will, he disposed of in the manner thereafter mentioned. The testator proceeded to give several legacies; and as to the rest and residue of the money which should then remain, he gave and bequeathed one third part thereof to the honest and industrious poor living in Earlsam, in the county of Suffolk, and the remainder to the honest and industrious poor living in or belonging to the adjoining parishes, or to his poor distant relations not mentioned in his will.

The testator died without any customary heir or next of kin.

The original bill was filed by the executors against the *Attorney-General*, and the lords of the manor were afterwards made parties by a supplemental suit.

The questions at the hearing on further directions were, whether the devisee took the copyhold estate discharged of the condition for payment of the 2,000*l.*; and, if not, whether that sum, or such proportion of it as, under the trusts of the will, was given after payment of *debts and legacies to purposes of charity which failed by the statute, belonged to the lords of the manor, or to the Crown. The VICE-CHANCELLOR (Sir JOHN LEACH) decided that the devisee took the land subject to the payment of the 2,000*l.*, and that the Crown was entitled by prerogative to that part of the bequest which failed by the Mortmain Act. The argument and judgment are reported in 2 Sim. & St. 498.

The plaintiffs, the representatives of the devisee, presented a petition of rehearing, and the case was argued on the 26th of May, 1829, before Lord Lyndhurst, by Mr. Sugden and Mr. Kindersley for the appellants, and by Sir Charles Wetherell and Mr. Wray for the *Attorney-General*.

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1829.
May 26.

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v.
A.-G.1830.
May 24.

On the 24th of May, 1830, Lord LYNTHURST made the following observations :

The case of *Henchman v. The Attorney-General*, which was argued some time since, and which now stands for judgment, was an appeal from the decision of the present MASTER OF THE ROLLS when Vice-Chancellor. The facts were these. A person of the name of Girling was seised of certain copyhold property in the county of Suffolk. He devised that property to Henchman, who was one of his executors, upon condition that he should pay 2,000*l.* to his co-executor, Martin Harsant. That sum of money he desired should be taken as part of his personal estate, and it was to be added to the residue of his personal estate ; out of that joint sum his debts and legacies were to be paid, and the surplus was to be applied to charitable purposes.

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This Court decided that the bequest to those charitable purposes was altogether void, as being contrary to *the provisions of the Statute of Mortmain ; in consequence of which the Master was directed, first, to inquire who was the heir-at-law of the testator Girling, and who were his next of kin. The Master reported that no person had made out a claim in point of evidence, either as heir-at-law or next of kin. The consequence was, that the lord of the manor, the devisee, and the *Attorney-General* on the part of the Crown, respectively claimed this property, or rather the balance of this property, part of it having been applied to the payment of a proportion of the debts and legacies.

The case was very elaborately argued upon all the various points that suggest themselves in a case of this description ; but there was one point that appears to me to require further consideration, and it is a point probably upon which my judgment will turn. The point I allude to is this ; whether, if this is to be considered as real estate in a court of equity, the Crown would take it by virtue of its prerogative ? The MASTER OF THE ROLLS stated in the course of his judgment that the Crown could not take it by escheat ; but whether it was to be considered as personal estate or real estate, the Crown would take it by virtue of its prerogative. That point certainly was argued at the Bar, but no authorities were cited ; and as I do not think that so much

attention was paid to it as the importance of the question demands, and as it probably will govern my judgment with respect to this case, I should wish that point to be argued distinctly and separately by one counsel on each side, and that an early day should be appointed for that purpose.

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Lord LYNDBURST shortly afterwards resigned the Great Seal, and the case was eventually re-argued by one counsel on each side before Lord Brougham.

1834.
May 23.

Mr. Kindersley, for the appellants :

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Where an estate is devised subject to a charge, which fails either because it is void by the Statute of Mortmain or for any other reason, it has been held that the charge sinks into the estate for the benefit of the devisee: *Wright v. Row* (1), *Jackson v. Hurlock* (2). The case of a charge is distinguished in this respect from an exception out of the gift; for, if it be an exception out of the devise, the heir will be entitled to the benefit of the failure: *Gravenor v. Hallum* (3).

The terms of this devise, however, are terms of condition, and, considering it as a devise upon condition, who is the person, in the case of a freehold or copyhold estate, entitled to take advantage of a breach of the condition? It is laid down by Littleton (4) that the lord by escheat cannot take advantage of a condition broken; and Lord Coke (5), in commenting on the statute 32 Hen. VIII., which gives a right to the grantor of a reversion to enter for a condition broken, says expressly, "But such as come in merely by act in law, as the lord by escheat, the lord that entereth or claimeth by mortmain, or the like, shall not take benefit of this statute." In respect of the right of taking advantage of a condition broken, the Crown cannot stand in a better situation than the lord, and the doctrine of prerogative is wholly inapplicable to a case of this kind. The case of *Arnold v. Chapman* (6) is an authority upon all fours with the present case to shew that it must be considered as real estate

(1) 1 Br. C. C. 61.

(4) Litt. s. 348.

(2) 2 Ed. 263.

(5) Co. Litt. 216 a.

(3) Amb. 643; and see *Cooke v. The Stationers' Company*, ante, p. 67.

(6) 1 Ves. Sen. 108.

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[*490]

undisposed of, and not as personalty. In *Arnold v. Chapman* the testator gave a *copyhold estate to the defendant Chapman, he causing to be paid to his executors the sum of 1,000*l.*, and after payment of his debts and legacies he gave the residue of all his estate to charitable purposes; and Lord HARDWICKE held the charge to be part of the testator's real estate undisposed of, and for the benefit of the heir. If there were an heir in the present case, a question might arise, as in *Smith v. Claxton* (1), whether the charge was descendible as land, or transmissible in the hands of the heir to his personal representative; but there can be no question as between the heir and the next of kin, and, consequently, no question whether the Crown can have any possible title to this estate as *bona vacantia* by virtue of its prerogative.

If the Crown, therefore, has any title, it can only be by way of escheat, and it has been decided that copyholds cannot escheat to the Crown: *Walker v. Denne* (2). But even if there were not that decisive objection, the claim of the Crown would be excluded by the doctrine established in *Burgess v. Wheate* (3), that the Crown can never come into chancery to compel the execution for its benefit of a trust which the heir might have compelled to be executed. The Crown has no equity in this Court to stand in the place of the heir-at-law, and the devisee therefore is entitled to take the estate discharged of the condition. As to the claim on the ground of prerogative, no case can be cited in which it has ever been held, that the prerogative of the Crown extends to the case of executing a trust of real estate.

Mr. Wray, for the Crown:

[491] The testator intended that the devised copyhold estate should be entirely converted into money. * * There is a partial failure of the purpose of the deviser in respect of that proportion of the 2,000*l.* which is devoted to charity, and the customary heir is entitled to the benefit of the failure; but he is entitled to it as money, and not as land, and it is transmissible as money to his personal representative, and not as land to his heir: *Smith v.*

(1) 20 R. R. 320 (4 Madd. 484).

(3) 1 Black. 123, and 1 Ed. 177.

(2) 2 R. R. 185 (2 Ves. Jr. 170).

Claxton (1). If the heir of the testator were entitled to the charge as unconverted real estate, the doctrine laid down in *Burgess v. Wheate* and in *Walker v. Denne* would apply, and the Crown would have no title; but if the charge be shewn to be money, the case of *Middleton v. Spicer* (2) has decided that, where there is no next of kin, the executor is a trustee for the Crown. It is immaterial that the charge has not been raised, and that the land continues in specie, for in equity the land which ought to be converted, and which by the will was directed to be converted, is considered as money; and the Crown is entitled to it by virtue of its prerogative.

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Mr. Kindersley, in reply :

The question is not here, as in *Smith v. Claxton*, in what character land directed to be sold, and as to which there is a total or partial failure of the testator's purpose, descends to the heir; but whether the Crown, by virtue of its prerogative, has a right to insist that the land *shall be converted into personalty. *Walker v. Denne* (3) has decided that where land continues in specie, and it remains *ad arbitrium* whether it is to be considered as land or money, the Crown has no equity in this Court to compel its conversion into personalty for the purpose of making a title.

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LORD CHANCELLOR BROUGHAM :

The question here arose principally between William Henchman, the devisee of a copyhold estate, and the Crown, (for the lord of the manor did not join in the appeal) and it related to the sum of 2,000*l.*, which the devisee was to pay the executor within a month after the testator's decease, and which was treated as personalty by the testator, and devised to a charitable use with the other parts of the residue. There was no customary heir or next of kin, and the question was, did the devisee take the copyhold discharged of the condition for payment of 2,000*l.*, and if not, did that sum belong to the Crown?

His Honour the MASTER OF THE ROLLS held that, whether this

1834.
Aug. 5.
—

(1) 20 R. R. 320 (4 Madd. 484).
(2) 1 Br. C. C. 201.

(3) 2 R. R. 185 (2 Ves. Jr. 170).

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sum were to be regarded as real estate or as personalty made no difference; for, in either case, the Crown was entitled by prerogative, though not by escheat. If it was real estate, the Crown took for want of a customary heir; if personal, for want of next of kin.

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I cannot at all go along with this view of the subject. The Crown has no such prerogative; it may take personalty as *bona vacantia*, but real estate it can never take unless by escheat, which here can have no place, because the copyhold tenement must escheat to the lord, *and not to the Crown; but any prerogative extending to real estate, as distinct from escheat, I never yet heard of.

The case of *Arnold v. Chapman* (1) was one which received great consideration, and Lord HARDWICKE there decreed that—copyhold land being devised to A., he paying 1,000*l.* to the testator's executors, and, after payment of debts and legacies, the residue to the Foundling Hospital—the 1,000*l.* was to be considered as real estate undisposed of; and that the executors took it under a resulting trust for the heir-at-law, the Mortmain Act rendering its application to the charity illegal. This decision proceeded upon the ground of the sum given to charitable uses being excepted out of the devise, and so undisposed of, unless the gift was valid, which by the statute it was not.

Gravenor v. Hallum (2) and other cases take the same view of the subject; on the other hand, where lands are given subject to a charge, and the charge is void under the Mortmain Act, the sum charged shall sink into the specific devise. *Wright v. Row* (3), and *Jackson v. Hurlock* (4), sufficiently illustrate the distinction.

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In the present case it does not appear to be material, whether the sum is considered as excepted out of the devise, or as a charge upon it; and for this reason. In the latter case, the devisee takes the whole at once, subject only to a charge which has no effect; in the former view there is a resulting trust for the heir; but *the heir cannot be found, or rather there is none, and such trust cannot escheat to the lord of the manor. Indeed,

(1) 1 Ves. Sen. 108.

(2) Ambl. 643.

(3) 1 Br. C. C. 61.

(4) 2 Ed. 263.

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as long as there is a tenant to perform the services, the lord never can take by escheat, and it would be absurd and contrary to all principle, and inconsistent with the very nature of property to hold that, while the devisee was in as tenant of the copyhold in general, a portion of it, or a sum charged on it, was in the possession or rather in the holding of no one, and so escheated *pro defectu heredis*. As, therefore, the lord cannot take; as, beyond all question, the Crown cannot take; and as there is here no heir of the testator, the devisee alone can take. He takes from necessity, indeed, and because there is none other to take, the resulting trust failing for want of a cestui que trust.

But there is another view which may be taken of the question. The money has never been raised; the condition on which the gift was made is unperformed; and this Court must be resorted to, in order to vest the money in the executors, and make the devisee perform his condition. Now, that the Court will raise the money for the heir-at-law whom it jealously protects, and will thus execute the trust which results in his favour so as to treat the proportion given contrary to the statute as if it were not given at all, and were still estate descendible on the heir, is certain, and the cases from *Arnold v. Chapman* downwards shew it. But the Court has never lent itself to raise money charged and destined to an illegal use for any other party, certainly not for the Crown; indeed, that principle is sufficiently established by the case of *Walker v. Denne* (1).

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That the Crown cannot take by escheat, this being copyhold, I have already observed. That this is not personalty there needs no argument to shew; indeed, *Arnold v. Chapman* and all the cases prove it. That the Crown can in no way be entitled is therefore clear. For, as to the prerogative touching such a case, it is contrary to the plainest and most fundamental principles governing English tenures.

But, if neither the Crown nor the lord can take, the question lies between the devisee and the testator's heir, who has no existence by the case. Therefore, upon the present state of the facts, the devisee is entitled, and the judgment below must be reversed, and the deposit returned.

1834.

June 30.

Rolls Court.

LEACH, M.R.

[495]

WASSE v. HESLINGTON (1).

(3 Myl. & Keen, 495—500; 3 L. J. (N. S.) Ch. 221.)

Where a testator directs that his debts and funeral expenses are to be paid by his executors, it is *primâ facie* to be considered that he means the payment to be made by them out of the funds which come to their hands as executors, but the direction does not shew any intention to charge real estates separately devised to the executors as individuals.

THOMAS HESLINGTON by his will dated the 16th of November, 1831, in the first place, directed all his just debts, and funeral and testamentary expenses, to be paid by his executors therein-after named; and he gave unto his wife Isabella all his household furniture, plate, linen, &c. which should be in and about his house at the time of his death. And he devised to his wife and her assigns, during her life, the dwelling-house at Skelton, with the appurtenances (except the barn) thereunto belonging, and from and after her decease he *devised the same unto and to the use of Thomas Heslington of Skelton, his heirs and assigns for ever. He also gave to his said wife and her assigns, during her life, one yearly rent-charge of 180*l.*, to be paid to her by equal quarterly payments; and he charged the same on the real estates thereafter by him devised to the said Thomas Heslington: and he thereby declared, that the provision made for his wife should be accepted by her in lieu and satisfaction of all dower and freebench which she might be entitled to upon his decease. And he gave the freehold closes or parcels of land and hereditaments then lately purchased by him, situate in the township of Dishforth, in the county of York, and also the sum of 1,000*l.* (which, as well as the legacy duty for the same, he charged upon the real estates thereafter by him devised to the said Thomas Heslington), unto the said Thomas Heslington, and his brother-in-law, George Parker, their heirs, executors, administrators, and assigns respectively, in trust immediately after his decease to place out at interest the said sum of 1,000*l.*, and to pay the interest thereof, and also the rents, issues, and

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(1) *In re Tanqueray Willaume and Landau* (1881) 20 Ch. Div. 465, 51 L. J. Ch. 434, 46 L. T. 542; *In re Brooke* (1876) 3 Ch. D. 630, 45 L. J.

Ch. 730, 35 L. T. 301, shew that the charge in this case might properly have included the estates devised to the executors as trustees.—O. A. S.

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profits of the said freehold closes, unto his wife's niece Isabella, the wife of Thomas Forest, during her life for her separate use ; and after her decease, in trust that Thomas Heslington and George Parker their heirs, executors, administrators, and assigns respectively, should stand seised of the said freehold closes or parcels of land, and be possessed of the said sum of 1,000*l.*, and interest upon such trusts as the said Isabella Forest should appoint ; and in default of such appointment, in trust for all and every the child and children of Isabella Forest, who being sons should attain twenty-one, or daughters should attain that age or marry, to be equally divided between them ; but if there should be no such child, as to the freehold closes for the right heirs of Isabella Forest, and as to the sum of *1,000*l.*, in trust for such person living at her decease, as would be entitled thereto by virtue of the Statute of Distributions. And the testator devised all such of his messuages, lands, &c. as were situate in the township of Kirkby Hill, and the close or parcel of land containing about six acres, therein described, unto and to the use of his said wife Isabella and her assigns during her life. And from and after her decease he devised the same unto the said George Parker, his heirs and assigns for ever, subject nevertheless to and chargeable with the sum of 1,000*l.*, which he thereby gave unto the said Thomas Heslington, and directed to be paid at the end of six calendar months after the death of his said wife, but to be a vested interest in the said Thomas Heslington immediately on the testator's decease. The testator proceeded to give two annuities, which he charged on the residue of his real estates devised to the said Thomas Heslington, and he gave to the two daughters of Hannah Tryers the sum of 50*l.* a piece, to be vested interests in them at his decease, but not payable until six calendar months after the death of their mother, and he charged the same on the residue of the real estates devised to the said Thomas Heslington ; and he then gave several pecuniary legacies, all which he charged upon the residue of his real and personal estate, devised and bequeathed to the said Thomas Heslington. And he devised and bequeathed unto the said Thomas Heslington all his freehold, copyhold, and leasehold estates whatsoever in Great Britain, except certain

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WASSE^r. hereditaments and premises thereinbefore mentioned, and all
 HESLINGTON. his personal estate whatsoever (except such part of his personal
 estate as was bequeathed to his said wife), to hold the same unto
 and to the use of the said Thomas Heslington, his heirs,
 executors, administrators, and assigns respectively, according to
 the natures thereof respectively, and for all his estate and
 [*498] interest therein, subject *to the several annuities and legacies
 charged thereon. And he appointed the said Thomas Heslington
 and George Parker executors of his will.

This was a creditor's suit, and the question in the cause was,
 whether the testator had charged his real estates with the
 payment of his debts.

Mr. Bickersteth, and Mr. Monro, for the plaintiff :

The introductory clause, in which the testator directs all his
 just debts, and funeral and testamentary expenses to be paid by
 his executors thereafter named, imposes a condition upon
 those executors, to satisfy the testator's debts out of all the
 property which they derive under the testamentary disposition,
 whether real or personal: *Henvell v. Whitaker* (1), *Finch v.*
Hattersley (2). The case of *Henvell v. Whitaker* was decided after
 a careful examination of all the authorities. In *Cloudsley v.*
Pelham (3), though the lands were devised to the defendant in
 tail with a remainder over, yet, as the defendant was appointed
 executor, with a direction that he should pay the testator's debts,
 it was held that the lands were charged with the payment of the
 debts. In *Elliot v. Hancock* (4), there were no express words to
 charge the land, but, the devisee being also appointed executor,
 the land was held to be charged with an annuity given by the
 will; and in *Alcock v. Sparhawk* (5), where the testator directed
 the devisee, whom he appointed his executor, to see his will
 performed, it was held that the real estate was charged with the
 legacies. In this case the executors cannot, therefore, take the
 estates devised to them otherwise than subject to the payment
 of debts.

(1) See 27 R. R. 88 (3 Russ. 343).

(4) 2 Vern. 143.

(2) 27 R. R. 88.

(5) 2 Vern. 228.

(3) 1 Vern. 411.

Mr. Pemberton, Mr. Tinney, Mr. Turner, and Mr. Bichner,
contra :

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A general direction to pay debts in the introductory part of a will has, no doubt, the effect of charging the real estates with the payment of debts ; but a direction for the payment of debts and funeral expenses by executors is applicable only to such property as naturally comes to the hands of executors for that purpose. In *Henvell v. Whitaker* the introductory words of the will were extremely strong in favour of the construction put upon them, all the testator's just debts and funeral expenses being directed to be fully paid and satisfied by the executor thereinafter named ; and the testator afterwards gave all his real, personal, and copyhold estates to that single executor. In this case each of the executors takes beneficial interests to a different amount under distinct devises. If the testator had intended, as in *Henvell v. Whitaker*, to impose a condition upon his executors, that they should pay his debts out of all his property, real as well as personal, that came to their hands, the executors would have been equally charged ; but the different amount of their interests is inconsistent with that supposition. When the testator intends to create a charge upon his real estates, he expresses himself in terms which are free from all ambiguity. Thus, the estate devised to George Parker, after the death of the testator's wife, is made subject to and chargeable with the sum of 1,000*l.*, which he gives to Thomas Heslington ; and he expressly charges two annuities on the residue of his real estates.

Mr. Bickersteth, in reply.

THE MASTER OF THE ROLLS :

Primâ facie the direction of the testator, that his debts and funeral expenses shall be paid by his executors, *imports an intention that the debts and funeral expenses are to be paid by them out of the funds which come to their hands as executors.

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In the case referred to it appeared to me to be manifest from the whole will, that the testator intended to subject all his

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property given by his will to the executors with the payment of his debts and funeral expenses.

It appears to me in this case to be equally manifest that he had not that intention (1).

1834.
Nov. 11, 18.

Lord
BROUGHAM,
L.C.

[517]

GIBLETT v. HOBSON.

(3 Myl. & Keen, 517—534; S. C. 4 L. J. (N. S.) Ch. 41.)

A bequest of money to a charitable institution "towards building alms-houses to the said institution," is *prima facie* a bequest for buying land and building upon it, and consequently void under the Statute of Mortmain. But matter *dehors* the will may be looked at for the purpose of placing the Court in the situation of the testator in order to determine whether the testator contemplated building upon land already in mortmain, or to be acquired by other means than the application of the legacy: Held, in the particular case, that the extrinsic evidence, so admitted, was insufficient to support the bequest.

JOHN JAY GRAVES, by his will dated the 14th of June, 1831, made the following bequest: "I give and bequeath to the Butchers' Charitable Institution, the sum of 5,000*l.* towards building alms-houses to the said Institution;" and he appointed the defendants executors of his will.

The testator was a member of the Butchers' Charitable Institution; and it appeared by evidence, tendered on the part of the plaintiffs, that he knew in the month of July, 1829, that a piece of land had been then lately offered by John Knight, one of the plaintiffs, for the erection of alms-houses for the use of pensioners of the Institution. At a meeting of the members of the Institution, held on the 9th of July, 1829, it was resolved that the offer should be accepted, and the thanks of the meeting were voted to Knight. Various *sums were subscribed towards the erection of the alms-houses, and a building-fund was formed, which, by resolutions passed at a subsequent meeting, was kept distinct from the other funds of the society. In January, 1831, Knight sent the title-deeds of the piece of land, (of the rents of which the building-fund committee of the Institution had been in the receipt from Midsummer, 1829) to the plaintiff Giblett, who was the President of the Institution, and a conveyance of the land was prepared; but the execution of that

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(1) See *Warren v. Davies*, 39 R. R. 133 (2 Myl. & K. 49).

conveyance was delayed in consequence of the money subscribed not being sufficient to commence the building of the alms-houses. The testator died on the 28th of November, 1831. The conveyance of the land, made between Knight and the trustees by bargain and sale duly enrolled according to the statute, was executed on the 28th of December following.

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The bill was filed by the President and other officers of the Institution, on behalf of themselves and the other members, against the executors of the testator, for payment of the legacy. The answer submitted that the bequest was void under the Statute of Mortmain. The cause was heard before the Vice-Chancellor, who decided that the bequest was void [as reported in 5 Simons, at p. 651].

The plaintiffs presented a petition of rehearing to the Lord Chancellor.

Sir William Horne and Mr. Walker, in support of the appeal.

The Solicitor-General and Mr. James Russell, *contrà*.

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Sir William Horne, in reply.

[In the present state of the law it seems unnecessary to state the arguments of counsel or to refer to the numerous cases cited by them, some of which are mentioned in the judgment.]

THE LORD CHANCELLOR [after stating the facts and referring to numerous decisions upon the point, said:]

Nov. 13.

The first position which I am justified by the cases in laying down, nay, by the whole authorities together called upon to lay down, is this, that a bequest of money or other personalty to any charitable institution to build or erect buildings, taken by itself, is within the statute. This seems plainly the good sense of the thing; for when I give any one 1,000*l.* to build a house with, and say no more, it is plain I imply that he should lay it out in buying land, and building *upon that land. Accordingly the cases hold that such a bequest without more is void under the Act; nor can any words be stronger to this effect than those used by Lord ELDON in *The Attorney-General v. Parsons* (1), and *The Attorney-General v. Davies* (2).

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(1) 7 R. R. 22, 26, line 17 (8 Ves. 186, 191).

(2) 7 R. R. 295, 297, line 23 (9 Ves. 535, 544).

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[After referring to these cases, his Lordship continued as follows:]

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The next position which I deduce from the authorities is, that, though the testator's intention to confine his bequest to mere building is best gathered from his own words in the will, yet we have a right to look at the whole circumstances of the case, because if these be such as to leave no doubt of the meaning which he had, and that the bequest was to build only upon land already in mortmain or which should be acquired by other means than the legacy, then the provisions of the Act do not apply. It seems, at first sight, as if the authorities to which I have referred were opposed to this extension, and prevented us from looking to matter *dehors* the will; for the language of Lord ELDON, and the opinion he cites from Lord THURLOW, are strong to confine us within the four corners of the will. But Lord BATHURST plainly went out of the will in *The Attorney-General v. Hyde* (1) and took into consideration the fact of land being in mortmain under the control of the trustees, and of a school having formerly stood upon it. Indeed he states those facts *dehors* the will, as forming the distinguishing feature of the case; and a case may be imagined where no doubt could exist as to the testator's intention, though not apparent on the face of the will; for example, a bequest to trustees to build in the parish of A., and all the land except one acre in that parish in settlement, being, we may suppose, to make it stronger, estate tail, with reversion in the Crown, so that the remainders could not be barred without an Act of Parliament, and the one excepted acre in mortmain, and the testator himself a co-trustee and also tenant in tail of the settled lands, consequently conusant of the state of the title of the lands in the parish. Here the presumption would be too violent to be resisted, that the testator could

[*530] *only intend a bequest to build with his legacy on the land already in mortmain: indeed no words he could have used could add to the evidence of such being his intention. In these cases we do not admit evidence *dehors* to give a meaning, or discover the intention of words used, but only place ourselves in the

(1) *Ambl.* 751.

situation of him who made the instrument by enabling ourselves to suppose we are in the circumstances in which he stood.

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Again, if we take the words of Lord ELDON literally in *The Attorney-General v. Davies*, they seem to confine the exception to cases where the land to be built upon is already (that is at the date of the will or at least at the testator's death) in mortmain. But the reason of the matter extends this also to cases where the testator may plainly appear to have in contemplation a future acquisition of building-land otherwise than by means of the legacy; and Lord ELDON clearly assumes this in what he says in the other case I have referred to, *The Attorney-General v. Parsons*, where he speaks of hiring or begging land.

I must, however, add this further position in limitation of the former,—that the *onus* of shewing that the intention of the testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that in one way or another, but especially where it is to be by matter *dehors*, that is by considering to what circumstances the instrument was applied, the intention must appear absolutely certain and clear to exclude the employment of the fund in purchasing land, and must not be a matter of speculation or conjecture. We may add, further, that where the purchase of land, or otherwise obtaining land to *build upon, is the fact relied upon, the circumstance of the land having been actually purchased by and vested in the legatees must always be a great deal more powerful than any expectation possibly can be: I mean where the words used do not apply directly to such land, and we only gather the intention from the fact of a purchase actually made or in progress or contemplation.

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These positions, which appear warranted both by principle and authority, lead us to an easy determination of the present question.

The bequest is of money to a charitable institution, towards building alms-houses without more. This *primâ facie* is a bequest for buying land and building upon it, nor does the word "towards" make any difference; it only indicates that the legacy was intended to increase a fund already begun, or intended to be formed for that purpose; and something must

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therefore be shewn *dehors* the will, something in the circumstances to which the testator must be understood to refer, and necessarily to refer; something which leaves no doubt at all that he did not mean the money to be used in buying land, but only in building houses. Now the only thing relied on with this view is the fact of Mr. Knight having previously given a piece of land upon which it is said the alms-houses might be built. Even if the fact had been so, would it prove more than that Mr. Graves's money might be used in building on the land so given; that is, would it shew more than a possibility of the money being used in building without purchasing? More than this it could not prove; for no one can maintain that the existence of such land in the possession of the Institution precluded the application of the legacy to the purchase of other building-land; and *it is equally certain that the words of the bequest would amply have justified such further acquisition of land, independent of Mr. Knight's land altogether. Indeed there is much weight in the argument that the building on Mr. Knight's land would have been a more questionable use of the fund than buying more land whereon to build. Therefore it is clear, in any view, that the having such a piece of land already did not at all tie the trustees down to building upon it. But if it did not, the conclusion follows irresistibly, that a course of conduct on the part of the legatees which was far from necessary, and was only one of two kinds of proceeding equally open to them, was not necessarily in the testator's contemplation, and therefore that we can have no right to read his bequest as if it were not towards building alms-houses generally, but towards building them upon land already in the possession of the Institution. So it would stand if the conveyance had actually been made of that land prior to the will.

This inference, however, is greatly strengthened, when we consider that this is by no means the case. The land had not been conveyed; the Institution, by Mr. Knight's sufferance, stood in the situation of tenants at will to him, and he had only let them into possession in the intention of making a merely voluntary conveyance to them, which intention was unexecuted till five months after the date of Mr. Graves's will, and one

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month after his decease. Mr. Knight might during all that time, nay after the death of the testator, have altered his intention ; or creditors, or the bankrupt laws, might have interposed to interrupt the execution of his design. In *The Attorney-General v. Hyde* (1) the land was actually in mortmain, and in the ownership as well as occupation of the parties *intrusted with the legacy to build a school—nay a school had once stood upon it, and yet Lord BATHURST decreed it to be a bequest to buy other land, because he did not think that fact sufficient to shew an intention of building on the parish land, thinking it on the whole more probable that the testatrix designed to found a school of her own. Surely we may consider it as probable here that Mr. Graves did not intend to make the execution of his benevolent design, with respect to so considerable a sum, depend upon the many accidents which might intervene to prevent the transfer of Knight's land into the ownership of the Institution. Who can doubt that if any one had said " You mean this 5,000*l.* to be used in building on the present land at Farnham Royal," he would have answered " Aye, or any other land you can conveniently buy with part of the money." He has said nothing at all to exclude that supposition, and the facts do not prove in the least degree that he did not contemplate it. Indeed the Institution held Knight's land under a power of selling it when and as they should please. The price would have gone to the building fund, and then Mr. Graves's legacy becomes a gift to a fund, part of which must be vested in the purchase of land in order that the rest might be used in building ; and neither by the words of the will, nor by the facts of the case is there any kind of restraint imposed which should direct the use of the legacy towards the one purpose rather than the other, if it once found its way into the fund.

I am therefore of opinion that his Honour the VICE-CHANCELLOR has come to a sound conclusion upon the subject, and that the decree dismissing the bill must be affirmed, but without any costs. The question was a very fit one to be brought here, and the Institution would not have discharged its duty had it not come forward *to claim the legacy. I further consider that the

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next of kin have, by the decision, obtained a fund contrary to the intention of the testator and in consequence of his ignorance of the law, and of his omitting expressions, which, had he known the law, he would assuredly have inserted in his will. The charity, and not the next of kin, were intended to be benefited; and therefore I give the costs out of the fund.



1833.
Dec. 16.

THE ATTORNEY-GENERAL v. THE CORD- WAINERS' COMPANY.

Rolls Court.
LEACH, M.R.

(3 Myl. & Keen, 534—543.)

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Where a testator devised certain estates to the Cordwainers' Company for the interest, use, and performance of his will; and gave a moiety of the rents to his brother for life, and out of the remainder of the rents directed certain specified payments to be made to charitable purposes, and to the officers of the Company, with a gift over to his brother in fee, if the Company should neglect to perform his will; it was held, that the Company took a beneficial interest in the rents of the estates, subject to the payments of the specified sums for charitable purposes; and an information seeking to have the whole augmented rents, or a proportional part of them applied to purposes of charity was dismissed with costs.

JOHN FYSHER, by his will, dated the 31st of March, 1547, after bequeathing certain legacies to charitable and other purposes, proceeded to devise as follows: "I do give and bequeath by this my present testament and last will unto the master, wardens, fellowship and Company of the craft or mystery of Cordwainers within the city of London, and to their successors for evermore, all that my house called the sign of the 'Falcon,' with all the tenements, as well on the street side as upon and within the back side, to have and to hold the same, with the appurtenances thereto belonging, situate on the south side of St. Dunstan's parish church in Fleet Street, for the only interest, use, and performance of this my last will and testament in manner and form following; That is to wit, first, I will that the said master, wardens, fellowship and Company, and their successors, shall without *contradiction, suit or delay, peaceably, gently, and quietly pay, or cause to be paid to my brother David Fysher, of the town of Shrewsbury, one annuity or yearly rent of 6*l.* sterling yearly during his natural life, to be paid to him at four usual

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terms in the year, that is to say, &c. Also I will that the said master, wardens, &c. immediately after the decease of the said David Fysher, shall pay, or cause to be paid to Mary Fysher, wife of the said David, one annuity or yearly rent of 40s., to be paid at two terms of the year, that is to say, &c., to continue during her life, if the said Margaret do overlive the said David Fysher her husband; and that they and their successors shall yearly distribute and bestow in alms within the parish of St. Dunstan's 5*l.* sterling, by 12*d.* a house, to every poor householder, and to such as shall be most needy and poor, by the discretion of the churchwardens of St. Dunstan's, and the overseers of this my last will and testament. And I also will that the said master, wardens, &c., and their successors of the Company of Cordwainers, shall yearly, for ever, cause a dirge or mass to be sung in the said parish church of St. Dunstan's for my soul, my friends' souls, and all Christian souls. And I will that the said masters, and wardens of the craft aforesaid shall yearly distribute and bestow in alms among poor people, strangers and others coming out of other places and parishes, the sum of 6*s.* 8*d.* And I will and direct that all such as be master and wardens, or shall be of the said craft of Cordwainers, shall be present at my dirge and mass, and at the distribution of the said alms, so that the said master shall have for his painstaking, and each of the wardens for their painstaking, once in the year to be done, 10*d.* a-piece. And I also will that every one of the churchwardens of St. Dunstan's in the West aforesaid, being present at the same distribution, shall have 12*d.* a-piece yearly for ever." And after certain other directions, and *a devise of certain estates therein mentioned to the said David Fysher, with remainder to Nicholas Parnell in fee, subject as to such remainder in fee to the payment of 4*l.* a-year for the charitable purposes therein mentioned, and after giving certain other pecuniary legacies, the testator proceeded as follows: "And all the residue of my goods not bequeathed I hereby give and bequeath to David Fysher my brother, whom I make my sole executor of this my last will and testament. And I admit for my overseer and supervisor Robert Fleetwood, being of the King's High Court of Chancery; provided always, that if

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the said master, wardens, fellowship and Company of the craft or mystery of Cordwainers aforesaid, do not well and truly perform, fulfil, and keep all and singular the thing and things above said by them to be observed, performed, fulfilled, and kept, but do cease in doing of the same by the space of one year, contrary to this my last will and testament, that then it shall be lawful for my said brother David Fysher and his heirs, into all the said lands, tenements, and other the premises with the appurtenances to enter, and the said premises to keep, have hold, and enjoy, to him, his heirs and assigns for ever; and the said master, wardens, fellowship, and Company, to be clearly expelled, discharged, and put out of the premises."

The estate devised to the Company consisted, at the date of the will, of the "Falcon" Inn, let at a yearly rent of 6*l.*, and two other messuages, let respectively at rents of 5*l.* and 1*l.* 6*s.* 8*d.* The annual rental had increased to the sum of 358*l.* The Company distributed the sums of 5*l.* and 6*s.* 8*d.* annually among the poor of the parish of St. Dunstan's and other poor, as directed by the will; and they also paid some other small sums, amounting in the whole to 2*l.* 17*s.* 6*d.*, to the minister, churchwardens, and officers of the parish, and, after *making such payments, they applied the surplus of the rents to the general corporate purposes of the Company.

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The information prayed that the Cordwainers' Company might be declared to be trustees of the rents and profits of the messuages and premises devised to them; that an account of the rents might be taken against the Company, and that the surplus rents might be applied in augmentation of the sums of 5*l.* and 6*s.* 8*d.* given to the charitable uses and purposes mentioned in the will, either in the whole or rateably with the other sums mentioned therein; or that some other proportional or reasonable augmentation of the sums directed to be paid for charitable purposes might be made out of the increased rents, in performance and advancement of the charitable intentions of the testator; and that a proper scheme might be settled by the Master.

The defendants by their answer insisted that they were devisees of the estates in question, subject only to the payment of the fixed and limited sums which the testator had directed to be paid; and

that they had a right, as their predecessors had always done, to apply the surplus rents to the uses and purposes of the Company.

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Upon the construction of the will two questions were raised; first, whether the testator intended to devote to charitable purposes the whole income of the estates devised to the Company; secondly, if the whole income were not so devoted, whether the objects of the charity were entitled to an increase in the sums given to them, proportioned to the amount of the increased rents.

Mr. Bickersteth and *Mr. O. Anderdon*, in support of the information [cited *The Mercers' Company v. The Attorney-General* (1), where there was a surplus of 9s. remaining in the hands of the Company; and yet it was held that the Company were trustees of the rents and augmented rents.] In the present case there was only a remaining sum of 18s. 6d. out of the rents existing at the date of the will, out of which sum the cost of a dirge and mass was to be paid, so that the whole rents might reasonably be considered as having been exhausted, and the case would fall exactly within the principle upon which the case of *The Mercers' Company v. The Attorney-General* was decided. * * *

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Mr. Pemberton and *Mr. Wakefield*, *contra* :

* * No case can be found in which the Court has applied the whole property of a testator to charitable purposes, unless the testator has expressly given it to such purposes, or his intention so to devote it is matter of necessary inference from the language or dispositions of the will. * * In *The Mercers' Company v. The Attorney-General*, the deed by which the Company were constituted trustees required not only all the existing rents, but all the future rents to be applied to the purposes of the will, every one of which purposes was a charitable trust, a circumstance which entirely distinguishes that case from the present. * * *

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Mr. Wray, for the *Solicitor-General*, who was made a party to represent the interest of the Crown in default of an heir. * * *

(1) 31 R. R. 36 (2 Bligh (N. S.) 165).

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Mr. Bickersteth, in reply.

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THE MASTER OF THE ROLLS :

The first question is, whether this testator intended the corporation to take as mere trustees, or whether he intended to give them any beneficial interest. The next consideration is whether, if the corporation were to take as trustees, they were to be trustees for mere charitable purposes.

It does not appear to me that the words of this devise do constitute this corporation mere trustees. The estate is absolutely given to them ; not upon trust, but for the use, interest, and performance of the testator's will. It is rather a gift upon condition, than a gift upon trust. They are to take the estate so devised to them, upon condition that they perform the duties which by the terms of the will are imposed upon them. Those duties are not for mere charitable purposes. Half the property that this testator disposes of, is disposed of to his brother ; an annuity of 6*l.* is given to his brother for his life ; and after his brother's death there is no disposition of this annuity, except that 2*l.* a-year are given to his widow if she survived him. These are not charitable purposes. It is plain that a beneficial estate was intended to be given to the Cordwainers' Company, because the testator expressly declares that, if the condition upon which this estate is devised to the corporation be not performed, the brother shall enter and defeat the estate given to the Cordwainers' Company. Defeat what estate ? An estate given to them in mere trust, from which they were to derive no benefit ?

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Is it to be supposed that *this was considered by the testator in the nature of a penalty ? The imposition of a penalty for non-performance of the condition implies a benefit, if the condition be performed, and is inconsistent with any other intention, than that the testator meant to give a beneficial interest to the Company upon the terms of complying with the directions contained in his will. There is, therefore, no trust either express or implied for charitable purposes further than to the extent of the special charge imposed ; and, upon all the principles applied in this Court to such a case, this information must be dismissed.

The most important consideration is, whether the information should not be dismissed with costs. I regret that the name of the *Attorney-General* has been used on this occasion; for I cannot but suppose that, if the attention of the *Attorney-General* had been sufficiently called to the case, he would not have sanctioned this proceeding by his name. It is true that his name is used; but, considering the merits of the case, or rather its demerits, I must

Dismiss this information with costs.

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TRICKEY v. TRICKEY.

(3 Myl. & Keen, 560—565.)

An ultimate gift, if no child of the testator's daughter should attain 21 nor leave issue who should attain that age, limited by a referential construction to issue living at the death of the testator's daughter, who alone were capable of taking under the previous gifts.

Income directed to be accumulated in excess of the statutory period belongs to the person who would have been entitled if no accumulation had been directed.

1832.
March 9.
Rolls Court.
LEACH, M.R.
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RICHARD TRICKEY, by his will, gave the residue of his personal estate to trustees, (whom he also appointed his executors) upon trust to pay the interest and dividends to his daughter, during her life, for her sole and separate use; and the will then proceeded as follows: "And after her decease, in trust to pay, assign, or transfer the principal or capital sums, or the securities on which the same may be invested, unto and amongst all and every the children of my said daughter, Jane Ann Frederick, if more than one, share and share alike, and if but one, the whole to such one child, when and as he, she, or they shall respectively attain the age of twenty-one years; and, in the mean time, to pay and apply the dividends and interest thereof for and towards the maintenance and education of such child or children respectively; and in case any or either of the said children, if there shall be more than one, shall die under the said age, and have one or more child or children who shall survive my said daughter, and live to attain the said age, such last mentioned child or children shall be entitled to the share or shares of his

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or their parent or parents of and in the said trust-monies, and the interest and dividends thereof. Provided also, that in case any *child or children of my said daughter shall die before he, she, or they shall attain the age of twenty-one years, the share or shares of him, her, or them so dying, of and in the said trust-monies, shall go and remain to the survivors or survivor of the said children, and the issue of any deceased child or children who shall marry and die under the said age, to be equally divided between them, if more than one, the issue of any deceased child to stand in the place of his, her, or their parent or parents. Provided further, and it is my will, that if there shall be no child of my said daughter, or there being any such, no one of them shall live to attain the age of twenty-one years, nor leave any issue who shall live to attain thereto, my said trustees and the survivors and survivor of them, his executors and administrators, shall stand possessed of and interested in the said trust-monies, and the dividends and interest thereof, in trust to assign and transfer all my Bank stock to my great nephew, Thomas Trickey, the son of my nephew, William Trickey, now or late of Oakingham, in the county of Berks; and all my stock in the 4 per cent. Bank Annuities, and all the residue of the said trust-monies, unto and equally between the rest of my relations, namely, the other children of my said nephew, William Trickey, the sons and daughter of my late brother, John Trickey, and Mary Gilbert, the daughter of my late sister Rachel Gilbert, or their respective executors or administrators: provided always, nevertheless, that if the dividends and interest of my residuary estate shall exceed the annual sum of 200*l.*, the surplus thereof shall be reserved and accumulate for the benefit of the child or children of my said daughter; and, on failure thereof, for my several other relatives hereinbefore named, in equal proportions."

The testator made a codicil to his will in the following words—
[*562] "By this codicil to the last will and testament *of me, Richard Trickey, I revoke the contingent bequest of my Bank stock to my great nephew, Thomas Trickey; and I will that on failure of children and grandchildren of my daughter Jane Ann Frederick, as therein is expressed, my said Bank stock, and 4 per cent.

Bank Annuities, and the residue of the said trust-monies shall be respectively transferred and paid to my several relations, namely, the said Thomas Trickey, and the other children of my nephew, William Trickey, the sons and daughter of my late brother, John Trickey, and Mary Gilbert, daughter of my late sister, Rachel Gilbert, in equal proportions."

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The testator died in June, 1800. His daughter, Jane Ann Frederick, died in December, 1828, having had one child, who died at the age of nine years. The bill was filed by the relations of the testator, named in the contingent bequest of the residue in the will and codicil, against the surviving executor; and the principal question in the cause was, whether the limitation over in the event of the testator's daughter having no child who should live to attain twenty-one, nor leave any issue which should live to attain that age, was or was not too remote; and this depended upon the point whether, according to the true construction of the will, it was the intention of the testator to confine his gift in favour of such grandchildren only of his deceased daughter as should survive his daughter.

*Mr. Bickersteth, Mr. Pemberton, Mr. Temple, Mr. Hayes, and Mr. Wright, for the plaintiffs. * * **

Mr. Tinney and Mr. Rolfe, contra.

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Mr. Bickersteth, in reply.

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THE MASTER OF THE ROLLS :

The first provision in the will in favour of the children of a child of the daughter who should die under twenty-one is confined to such grandchildren as should survive the daughter; and, if in the subsequent passages of the will the testator is to be understood to speak of such grandchildren only, the limitation over is plainly not too remote, as it extends only to a life in being, and twenty-one years. In this first provision, he refers only to the case of a child of the daughter dying under twenty-one and leaving no issue; and this is obviously the event for which he means to provide by the next limitation. If a child of the daughter dies under twenty-one, leaving no issue, the share

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intended for such child is to be divided between the surviving children and the *issue of a deceased child, such issue with respect to such division to stand in the place of their parent. It is reasonable to intend that the testator meant that the same grandchildren, who by the former clause were to take their parent's original share, should take that portion of the share which accrued by the death of another child of the daughter without leaving issue, and which their deceased parent, if living, would have taken, namely, the grandchildren only who should survive the daughter. Then follows the limitation over in case there be no child of the daughter who shall live to attain the age of twenty-one, or leave issue who shall attain that age; and, if the prior gifts are only in favour of grandchildren who shall survive the daughter, the gift over must be intended to take effect upon failure of the former gifts, and is, therefore, to take effect upon the failure of grandchildren who shall survive the daughter and not live to attain twenty-one, and is therefore plainly not too remote.

The daughter having lived for twenty-six years after the death of the testator, I am of opinion that the accumulations of the dividends and interest exceeding the sum of 200*l.* were good for twenty-one years, under the statute of the 39 & 40 Geo. III. c. 98; and the daughter, during the rest of her life, was entitled only to the interest of the accumulated fund, which, after her death, passed by the limitation. The accumulation having ceased at the end of the twenty-one years, from that time, during her life, the daughter was entitled to the whole sum beyond the 200*l.*, being the person who would have been entitled if such accumulation had not been directed.

1834.
June 26, 27.
Rolls Court.
LEACH, M.R.
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ANGIER v. STANNARD.

(3 Myl. & Keen, 566—572; S. C. 3 L. J. (N. S.) Ch. 216.)

The owner of an equitable estate conveyed it to trustees upon trust for sale, and by a deed of even date declared the trusts upon which the produce of the sale were to be applied. The party who had the mere legal estate and no beneficial interest, refused to convey it to the

equitable trustees, unless the persons interested as cestuis que trust under the deed of even date were made parties to the conveyance. He was not justified in that refusal, but as he had acted *bonâ fide* under the advice of a conveyancer of character, the Court made the decree against him without costs.

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By an indenture of mortgage dated the 2nd of February, 1828, certain freehold and leasehold lands, messuages, and hereditaments were assigned to Jeremiah Stannard for the residue of a term of 1,000 years, subject to a proviso whereby it was agreed that, if the plaintiff John Angier the elder, his heirs, executors, administrators, or assigns, should pay unto Jeremiah Stannard, his executors, administrators, or assigns, the principal sum of 1.100*l.* and interest therein mentioned, then Stannard, his executors, administrators, or assigns, would assign, surrender, or otherwise assure all and singular the said freehold and leasehold hereditaments respectively to John Angier the elder, his heirs, executors, administrators, and assigns, or otherwise as he or they should direct or appoint.

John Angier the elder, having subsequently become desirous of vesting the freehold of inheritance and equity of redemption in the mortgaged premises, and also certain other estates and hereditaments, in trustees for sale, for the purpose of raising money to pay off the mortgage, and to answer his other occasions, by indentures of lease and release and assignment, of the 7th and 8th of August, 1832, conveyed unto John Angier the younger and Edward Clay, their heirs and assigns, the freehold messuages and hereditaments comprised in the indenture of the 2nd of February, 1828, and also assigned and transferred the leasehold land and premises to John Angier the younger and Edward Clay, their executors, administrators, and assigns, for the *residue then to come of the 1,000 years term, upon trust to sell and dispose of the same hereditaments and premises in the manner therein expressed, without any further consent or concurrence of any person or persons whomsoever, and to stand possessed of the monies arising therefrom upon the trusts declared in and by a certain other indenture of even date, and therein referred to; and it was thereby declared, that the receipt of the trustees should be a sufficient discharge for all monies which they should receive in virtue of the trust deed.

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In pursuance of the trust, the greater part of the estates and premises were sold in lots to different purchasers; and out of the produce of such sales the sum of 1,200*l.* was, in the month of March, 1833, by the direction of John Angier the elder, paid to Jeremiah Stannard, in full satisfaction and discharge of all principal money and interest due to him on his mortgage security; and a memorandum in the following words, signed by Stannard, was indorsed upon the mortgage deed of the 2nd of February, 1828,—“Be it remembered that I, the within named Jeremiah Stannard, do hereby acknowledge to have had and received of and from the within named John Angier, &c. the sum of 1,200*l.* being in full discharge of all principal monies and interest, due and owing to me from the said John Angier upon security of the freehold and copyhold hereditaments comprised in the within written indenture; and I do hereby for myself, my executors, administrators and assigns, undertake, promise, and agree, that I will, when required, but at the costs and charges of the said John Angier, his appointees, trustees, or assigns—execute an assignment of the freehold premises comprised in the within indenture, for the residue of the *term within mentioned, to such persons, to such uses, and in such manner and form as he or they shall direct or appoint.”

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The conveyances to the purchasers of the several lots were not completed immediately upon the sale; but it was arranged between the trustees and the respective purchasers, that an assignment of the term in the freehold hereditaments should be taken to a trustee nominated by John Angier the elder; and a draft of such assignment was accordingly prepared and sent to the defendant's solicitor, who made various objections thereto. The draft was afterwards laid before counsel to be settled by him on behalf of all parties; and the draft, so prepared and settled, was again sent to Stannard, who objected to it on the ground that the cestuis que trust under the deed of trust were not made parties: and he returned the draft, accompanied by a letter from his solicitor in the following terms: “I return you this draft, perused by Mr. — on behalf of Mr. Stannard, with a copy of his accompanying observations. Mr. Stannard cannot dispense with the required concurrence of the cestuis que trust.”

The draft, as settled by the counsel for Mr. Angier, was afterwards engrossed, and the engrossment, having been executed by Mr. Angier and the trustees, was tendered to Mr. Stannard for execution. That gentleman, however, declined to execute it; and the present bill was thereupon filed by John Angier the elder, and the trustees for sale under the trust deed, praying that Mr. Stannard might be compelled to assign the legal estate in the term then vested in him, as the plaintiff should direct, and that he might be decreed to pay the costs of the suit. * * *

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It was proved in the cause by evidence, that a conveyancer of experience and reputation, who was consulted on behalf of the defendant, had advised the defendant to require that the cestuis que trust under the indentures of the 7th and 8th of August, 1832, should be parties to the assignment.

[569]

Mr. Pemberton, Mr. Preston, and Mr. Coventry, for the plaintiffs, said the real question was upon what terms the decree against the defendant ought to be made; whether with or without costs. * * *

Mr. Bickersteth and Mr. Richards, contra [cited *Goodson v. Ellisson* (1)]. The true rule with respect to the situation and duty of trustees was clearly expressed in *Taylor v. Glanville* (2), which decided that a trustee was always entitled to his costs, unless where he had acted from motives of obstinacy and caprice.

[570]

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS:

[571]

The proper decree in this case is matter of course, that the defendant should execute a conveyance of the legal estate to the equitable trustees, and that all necessary parties should join in the conveyance to be settled by the Master, if the parties differ. If either party should be dissatisfied with the opinion which the Master should form as to the necessary parties, the

(1) 27 R. R. 127 (3 Russ. 583).

(2) 18 R. R. 210 (3 Madd. 176).

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question, which has been now discussed, would then come regularly before the Court upon an exception. As, however, the defendant is willing to adopt the conveyance which has been prepared and engrossed without making the cestuis que trust parties, in case the Court should think that they are not necessary parties, I will now proceed to give my judgment upon that point.

If he, who has the mere legal estate, so deals with it, as to sanction any act done by the equitable trustee to the prejudice of the cestuis que trust, he thereby becomes a party to the breach of trust, and is answerable accordingly; but where the equitable trust is for the purpose of sale, he who has the legal estate is for the benefit of the cestuis que trust bound, when required, to convey it to the equitable trustee to enable him to execute his trust. If, in parting with the legal estate, he goes beyond the mere purpose of conveying it to the equitable trustee, and so deals with it as to facilitate a breach of trust by the trustee, and a breach of trust be in consequence committed, he is deemed a party to such breach of trust, and is responsible for it.

[*572] In this case it was the duty of the defendant who had the mere legal estate to clothe the equitable trustee with it; and, nothing further being required from him, and it being manifestly for the benefit of the cestuis que *trust, it could not be necessary for the defendant's security that the cestuis que trust should be made parties to the conveyance, in order to evidence their consent to the deed, and the demand made, on the part of the defendant in this respect, is not to be justified.

I am not, however, willing to charge the defendant with the costs of the suit which he has thus occasioned. He has acted *bonâ fide* under advice which has misled him, but upon which he had reason to rely from the experience and character of the adviser. It is for the interest of society that a trustee, under such circumstances, should not be fixed with the costs of the suit; but the adviser who misled him, being of his own choice, I cannot give him the costs of the suit.

SAWYER v. BIRCHMORE (1).

(3 Myl. & Keen, 572—579.)

Demurrer by a witness examined by the plaintiffs, on the ground that he had been the solicitor of some of the defendants, and that the interrogatory required the disclosure of confidential communications, overruled, the witness being bound to produce letters communicated to him from collateral quarters to which the interrogatory pointed, and to answer questions seeking information as to matters of fact, as distinguished from confidential communications.

1835,
May 12, 13.
July 22.

Rolls Court.
PEPYS, M.R.
[572]

THIS was the demurrer of John David Towse, a witness examined by the plaintiffs, to an interrogatory whereby he was asked, whether in the year 1817, or at any and what time, he was employed as solicitor or agent, for any and which of the parties in the cause; and whether or not he wrote and sent any letters to any other, and which of the said parties, or to any and what person or persons, acting as their solicitor or solicitors, touching any and which of the matters in the *suit; and whether or not he received any letters from any and which of such parties, or from any and what person or persons, acting as their solicitor or solicitors. And if so, the witness was required to produce such letters, or copies of them, as were in his possession or power, and as to such letters or copies as were not in his possession or power, to set forth the contents thereof, and what was become of such letters or copies. And whether or not he did at any time, and when, attend any meeting, or meetings of any of the parties to the suit, or their solicitors or agents, touching or concerning their interests or claims in the matters in the pleadings mentioned, or any and what part thereof. And if so, to set forth when and where such meeting or meetings took place, who were present, and what conversation or communications took place thereat.

[*573]

To this interrogatory the deponent said, that in the year 1817, he was employed as solicitor or agent for the defendants Henry Robert Briggs, Robert Briggs, and Ann Birchmore, and that he wrote some letters, touching the matters in the suit, to certain persons, when so acting as the solicitor for the said defendants, and that he received certain letters when acting as such solicitor,

(1) *Lyell v. Kennedy* (No. 2) 9 App. Cas. 81, affg. S.C. (1883) 23 Ch. Div. 401, 48 L. T. 455.

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but as to and from that part of the interrogatory which inquired after the persons to whom the said letters were addressed, and required him to produce the said letters, to the close thereof, he demurred thereto, and, for cause of demurrer said, that being at the time of writing the said letters employed as solicitor by some of the parties defendants in the cause, he could not depose thereto without disclosing communications made in confidence to him by his clients.

Mr. Pemberton and Mr. Lynch, in support of the demurrer :

[574]

The rule is settled that a solicitor cannot be called upon to disclose confidential communications which have passed between him and his clients, * * or between him in his character of their solicitor and any other persons, at any meeting held with reference to matters in which he was confidentially employed : [*Wilson v. Rastall* (1).]

Mr. Bickersteth and Mr. Moore, contra :

[*575]

This bill is filed by persons claiming to be some of the next of kin of a testator, who died intestate as to the residue of his personal estate in the year 1814, against the defendants, among whom the residue has actually been distributed under a decree of the Court as the sole next of kin. In the year 1817 Mr. Towse was solicitor *for some of the defendants ; and at that time, and for some years afterwards, the plaintiffs and defendants were making common cause together, all claiming, and admitted by each other, to be the next of kin of the testator, and seeking to satisfy the executors that their claims were well founded. The letters and communications between Mr. Towse and the parties or their solicitors, to the disclosure of which Mr. Towse demurs, took place between the years 1817 and 1825, when the plaintiffs and defendants were not opposed to each other, and when a suit was so far from being in contemplation, that they were all concurring in their endeavours to satisfy the executors without a suit. In the year 1825, one executor filed a bill against the other, for the purpose of having the residue distributed among the persons who should be found next of kin,

and in that suit the distribution, of which the present plaintiffs complain, was made. The interrogatory does not require the production of any letters except those which passed between Mr. Towse and persons who were not his clients, and these are clearly not privileged. The other part of the interrogatory seeks a disclosure of what passed at a meeting between Mr. Towse, then solicitor for three of the defendants, the solicitor of other defendants, and some of the defendants themselves at a time when there was no subject in dispute, when all parties admitted themselves to be the next of kin, and when Mr. Towse's clients had no distinct and separate interest from the other persons. The information sought relates to a collateral matter of fact; and it has been held that an attorney is bound to answer questions as to collateral facts within his knowledge, however unfavourable such facts may be to his client, and though the knowledge of them may have been acquired in consequence of his character of attorney: *Spenceley v. *Schulenburg* (1). In *Bramwell v. Lucas* (2), a conversation between a client and his attorney at the office of the latter, the effect of which was to prove an act of bankruptcy against the client, was held not to be privileged; and Lord TENTERDEN, in giving the judgment of the Court, put the ground of the decision upon this distinction, that the conversation related to a matter of fact, and not to matter of confidential communication.

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Mr. Pemberton, in reply.

The MASTER OF THE ROLLS (3) said the language of Lord TENTERDEN, in the case referred to, required consideration. On the following day his Honour said he had looked into the case of *Bramwell v. Lucas*, and certainly the communication between the attorney and client came very near to a confidential communication, and yet the Court held it not to be privileged. Lord TENTERDEN in his judgment said: "The action was brought by the assignees of Noakes, a bankrupt; and Scott, his attorney, was called by the plaintiffs to prove the act of bankruptcy.

(1) 7 East, 357. See judgment, *post*.
post, p. 136.

(3) Sir C. Pepys.

(2) 2 B. & C. 745. See judgment,

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[*577]

He gave in evidence that upon his (Scott's) suggestion a meeting of Noakes's creditors was called; that the meeting was to be held on the 7th of November at twelve at noon; that Noakes called on him that morning and asked if he could safely attend such meeting without being arrested; that Scott advised him to remain at his office till it was ascertained whether the creditors would engage to give him safe conduct, and that he accordingly remained there two hours to avoid being arrested, till Scott returned from the meeting: and the question is, whether the whole or any *part of this evidence ought to have been excluded; that Scott was competent to prove that the meeting was called; that it was called upon his suggestion, and that Noakes came to and remained at his office is beyond all doubt; but the point disputed was, whether Noakes's question to Scott, and Scott's answer to him, was not within the privilege, and we think it was not." And the ground upon which the Court decided that it was not, was this, that the question put by the bankrupt to Mr. Scott was not a question for legal advice put to him in his character of attorney, but a question for information as to a matter of fact. "It can hardly be supposed," said Lord TENTERDEN, "that a man could ask as matter of law, whether he would be free from arrest whilst attending a voluntary meeting of creditors; but he might well ask as matter of fact, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent an arrest, and Mr. Scott's answer implies that the question was put with the latter view."

In *Spenceley v. Schulenburg* (1) it was held that an attorney was bound to disclose, when called as a witness, the contents of a notice, which he received from the adverse attorney, to produce a paper in the hands of his client, Lord ELLENBOROUGH observing that the privilege of an attorney extended only to confidential communications from his client, and not to communications from collateral quarters, although made to him in consequence of his character of attorney.

These authorities shewed that letters communicated to Mr. Towse from collateral quarters, to which the interrogatory clearly

(1) 7 East, 357.

pointed, were not protected, and that *the witness was bound to answer questions seeking information as to matters of fact, as distinguished from matters of confidential communication. The demurrer must be overruled and with costs, but with liberty to the parties defendants to raise such objections at the hearing as they might be advised.

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[*578]

[NOTE.—Further proceedings in this suit are reported in 1 Keen, 403, and will be contained in the corresponding volume of the Revised Reports.—O. A. S.]

JONES v. POWLES (1).

(3 Myl. & Keen, 581—599; S. C. 3 L. J. (N. S.) Ch. 210.)

The rule that a purchaser for valuable consideration without notice is protected by the legal estate, extends not only to cases where his title is impeached by reason of some secret act done by the vendor or those under whom he claims, but to cases also where his title is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, provided such asserted title is clothed with possession, and the falsehood of the alleged fact could not have been discovered by reasonable diligence.

1834.
June 7, 27, 28.
July 7.

Rolls Court.
LEACH, M.R.
[581]

By indentures of lease and release, dated respectively the 21st and 22nd of December, 1800, John Jones, a hatter in Hereford, mortgaged a freehold house and premises, situate in High Street, in that city, of which he was seised in fee, to William Holbrook and his heirs, to secure the sum of 200*l.*, advanced to him by Holbrook, with interest.

John Jones paid off the mortgage and all arrears of interest in the month of August, 1808, and at the same time took from Holbrook a memorandum, which was indorsed upon the mortgage deed, acknowledging such payment; but he never obtained a reconveyance of the property, and at the time of his death, which took place in the month of May, 1814, the legal estate

(1) This decision has been approved and followed in subsequent cases: *Carter v. Carter* (1857) 3 K. & J. 617, 638, 27 L. J. Ch. 74; *Young v. Young* (1867) L. R. 3 Eq. 801; but in *Cooper v. Peary* (1882) 20 Ch. D. 611, 51 L. J. Ch. 862, 47 L. T. 89, the Court of Appeal (being, since the Judicature

Acts, no longer merely a Court of equity) gave relief against a *bond fide* purchaser for value whose title was derived under a forged deed, although such title was clothed with possession and there was no negligence on the purchaser's part.—O. A. S.

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[*582]

in the mortgaged premises remained outstanding in Holbrook. Immediately upon the death of John Jones, one Benjamin Meredith, who had been his shopman and *assisted him in his business, produced and proved in the proper Ecclesiastical Court an instrument purporting to be the will of John Jones, by virtue of which he obtained undisturbed possession of the messuage and premises comprised in the mortgage. This instrument was in the following words: "The will and testament of John Jones, hatter, dated September 12, 1802. I do hereby will and bequeath, after all my just debts and funeral expenses are paid, the whole of my real and personal property to my assistant Mr. Benjamin Meredith. In testimony of which witness my hand: JOHN JONES—Witnesses JOHN COWMEADOW, HENRY HILL, THOMAS JONES."

Meredith, shortly after the death of John Jones, had occasion to borrow a sum of 300*l.* from one Hall, upon the security of the property in question; and, accordingly, in consideration of 300*l.* lent to Meredith by Hall, Holbrook, as the trustee of the legal estate for Meredith, and, at his request, joined with Meredith in a deed, dated the 2nd of February, 1815, by which the messuage and premises in High Street were conveyed to Hall, his heirs and assigns, subject to redemption upon payment of the 300*l.* and interest.

Meredith died in the month of April, 1815, having devised the equity of redemption of the mortgaged premises to his wife Susannah, in fee; and by divers mesne conveyances the title to that equity of redemption became, in the month of March, 1821, vested in a person of the name of James Jones in fee.

[*583] In the month of October in that year, one Watkins, at the request of James Jones, paid off the 300*l.* then due upon the mortgage to Hall, and, in consideration of the money so paid, the mortgaged premises were, at *the same time, conveyed by Hall and Jones to Watkins, subject to redemption by Jones, on payment of the 300*l.* and interest; and that sum was, by a subsequent transaction in September, 1822, increased to 600*l.*

Soon after the period of the last-mentioned transaction, James Jones and Watkins having entered into co-partnership, they applied to John Powles for a loan of 450*l.*, and, Powles having advanced the money, Watkins, with the consent of his partner Jones, deposited with Powles the mortgage deed, and all the

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title deeds relating to the property, by way of security for his advances. Powles having afterwards lent them further sums, he was eventually let into possession as mortgagee; and he continued in possession until the month of April, 1828, when he died, leaving the defendant, Sarah Powles, his widow, whom he appointed his executrix, and to whom he devised all his mortgages and trust estates.

Upon the death of her husband, Sarah Powles entered into possession, and made further advances to Jones and Watkins, on the security of the same property, to the amount, in the whole, of 2,000*l.*; and in the month of September, 1830, James Jones and Watkins, by a deed which recited that Sarah Powles had contracted for the purchase of this estate for 1,200*l.*, and that she was to retain that sum in part discharge of the monies due to her from Jones and Watkins, it was witnessed that, in consideration of 1,200*l.* and of the discharge given by Watkins to Jones from the 600*l.* due to him, Watkins and Jones conveyed and released the house and premises to Sarah Powles, her heirs and assigns, for ever.

In the month of July, 1831, the present bill was filed by David Jones and Sarah his wife, against Sarah Powles. The bill alleged that John Jones died intestate, *leaving the plaintiff, Sarah Jones, his heiress-at-law; that John Jones never made any will duly executed and attested to pass real estate by devise, and that the signature and the attestations of the witnesses to the pretended will were forged or fictitious; and it prayed that the plaintiffs might be permitted to redeem the estate, on payment of what should be found due in respect of the mortgage; and also, if necessary, that an issue might be directed for the purpose of trying whether John Jones made any valid demise of the property in question.

[*584]

The defendant having put in her answer, setting forth her title, as it has been already stated, the plaintiffs filed a supplemental bill, in which they detailed the history of the several mortgage transactions, as before mentioned, and alleged that the defendant was in possession and enjoyment of, and claimed to be entitled to the premises, not as mortgagee, but as absolute owner under the forged will. The supplemental bill further stated

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that, at the instance of the plaintiffs, the administration with the pretended will annexed, obtained by Meredith, had been declared void by the Ecclesiastical Court, and fresh letters of administration granted to the plaintiff, Sarah Jones. It then charged that the defendant had notice of the forgery, and prayed the same relief as if these matters had been stated in the original bill.

[*585] The defendant, by her answer to the supplemental bill, admitted that the mortgage to Holbrook was paid off in the lifetime of John Jones, but that the legal estate was not reconveyed at his death; and she claimed to be entitled to the absolute ownership of the house and premises, as a purchaser for valuable consideration, without notice of the forgery; and she denied the title *of the plaintiff Sarah Jones, as the heiress-at-law of John Jones.

At the hearing of the cause the MASTER OF THE ROLLS directed that the bill should be retained for twelve months, with liberty to the plaintiffs, in the mean time, to bring an action of ejectment to recover possession of the premises; and the defendant was not to set up the Statute of Limitations, or the legal estate in the premises, which was outstanding in William Holbrook at the death of John Jones, and which had subsequently been acquired by the defendant.

An action of ejectment was accordingly brought, and was tried at the last Spring Assizes for the county of Hereford, when the plaintiffs recovered a verdict, having fully established, by their evidence, that the pretended will of John Jones was a forgery, and that the plaintiff Sarah Jones was his heiress-at-law.

The evidence in the cause established that, in the month of July, 1825, notice was given to John Powles, the mortgagee, and the defendant Sarah, his wife, by a solicitor acting on behalf of a party who claimed to be the heir of John Jones, that he had received instructions to institute legal proceedings for the purpose of setting aside the will, on the ground that it was a forgery.

The cause now came on for further directions upon the equity reserved.

Mr. Tinney, for the defendant, contended that the defendant must be considered as standing in the situation of a *bona*

*n*de purchaser for value, in respect of all advances made by her testator, on the security of the mortgaged premises, prior to the time when the *notice of proceedings to impeach the will, on the ground of forgery, was given; and that to the extent of those advances, therefore, she had a right to protect herself by the legal title which she obtained under the conveyance of 1830.

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[*586]

The MASTER OF THE ROLLS, however, intimated an opinion that the protection, afforded by the legal estate, might possibly be confined in equity to such *bonâ fide* purchasers only as derived their estate from a party who was capable, or who, but for some secret act of his own, would have been capable of passing some estate.

Ultimately the cause stood over for a short time, to give counsel an opportunity of looking into and considering the authorities with reference to that distinction.

The argument was now resumed.

June 27, 28.

Mr. Tinney and Mr. Phillimore, for the defendant :

The root of the defendant's title is the mortgage executed to Watkins in 1821, at the request of James Jones, who claimed to be devisee of the property in fee; and the question is whether, the legal estate having been conveyed in that year by Hall to Watkins, and by him to the defendant in 1830, the latter is not now entitled to protect herself against the claim set up by the plaintiffs, on the ground that she has in her the legal title, and is, to the extent of the advances made by her testator prior to the notice, a *bonâ fide* purchaser for valuable consideration. Meredith claimed to be, and apparently was seised as devisee in fee. * * The broad and general terms in which the principle is uniformly laid down, that a court of equity will not deprive a purchaser for value without notice of the protection afforded by the legal estate, apply equally to purchases from a person such as Meredith, who never had in him anything beyond an apparent title, and to purchases from a person who may have possessed, either then or at a former period, some

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title to or interest in the property conveyed, although an imperfect and defeasible one: [*Bassett v. Nosworthy* (1).]

[590]

The principle is strongly illustrated by the doctrine of courts of equity with respect to conveyances made by traders to *bonâ fide* purchasers for value after *a secret act of bankruptcy, or after a commission issued. * * The effect of a commission is to vest the whole estate of the bankrupt in his assignees, so that after his bankruptcy he would be a mere intruder, having not a particle of interest, and holding, like the parties here who claim under Meredith, by a merely apparent title; and yet in such a case a court of equity will not assist the assignees to recover the estate against a *bonâ fide* purchaser for value.

[*591]

The proposition as laid down by Lord NORTHINGTON in *Stanhope v. Earl Verney* is clear and universal, that "a purchaser without notice for a valuable consideration is a bar to the jurisdiction of this Court, and it is of no consequence when the legal advantage was acquired, if the purchase was made, and the money paid without notice"(2).

Mr. Pemberton and Mr. Bethell, for the plaintiffs:

[592]

The mortgage by Jones to Holbrook was made in December, 1800, and was paid off in the year 1808. * * Holbrook was a trustee for the real representative of John Jones, that is to say, for the plaintiff Sarah Jones; and the defendant having acquired, as a purchaser, such interest as Meredith had in the estate (which interest was in effect *nothing, Meredith being a mere intruder), has subsequently procured an assignment to herself of the legal estate conveyed in 1814 by Holbrook to Hall.

[*593]

The points to be considered are, first, whether a purchaser for value can, under any circumstances, avail himself of a legal estate acquired from a trustee, as a protection against the cestui que trust; and, secondly, whether such purchaser can do so when he claims under a wrong-doer, who had no connection with, or interest in the estate which he pretended to convey.

No authority has been or can be cited in support of the proposition that a purchaser, claiming from a stranger, may

(1) Ca. temp. Finch, 102.

(2) 2 Eden, 85.

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protect himself, notwithstanding he has notice of the trust, by procuring an assignment of the legal estate from a person who holds that estate as a trustee for the real owner; and the doctrine of the Court in *Saunders v. Dehew* (1) is directly to the contrary. * * *

[594]

With respect to the second point, can a single case be pointed out which does not fall within the restriction suggested by the Court; namely, that a purchaser, in order to protect himself effectually by the acquisition of the legal estate, must be a purchaser deriving his title from a person who, but for some secret act of his, or of those under whom he claims, would have had good right to convey? The only case in which it is suggested that a decision has gone beyond the proposition thus qualified is *Bassett v. Nosworthy* (2); and that, when examined, will be found to fall within the restriction. * * * Here Meredith was a mere intruder, not having even a colorable title; for the title, by virtue of which he entered upon the premises, had not been confirmed by long possession; and a person claiming under an intruder can have no right to set up the legal title to defend himself against the rightful owner. A man may have an equitable interest, and, having that interest, he may, with a view to his protection, clothe it with the legal estate: but if he claims a title derived from one who had himself no title whatever, one who, in fact, was a mere wrong-doer, or disseisor, he cannot afterwards protect himself against the rightful owner by getting in the legal estate; or, if he could so protect himself in any case, it must be by getting in a dry legal estate; not, as in this case, an estate vested in a trustee and coupled with an express trust for the rightful owner.

[595]

Mr. Tinney, in reply, observed that *Holbrook*, after his mortgage money was paid off, stood precisely in the situation of an ordinary trustee of a legal term which has been satisfied, and is held in trust for the equitable owner of the property. *Saunders v. Dehew*, therefore, had no application. It was settled by a multitude of *cases, among others by *Willoughby v. Willoughby* (3), that the circumstance of the legal title having

[*596]

(1) 2 Vern. 271.

(3) 1 R. R. 397 (1 T. R. 763).

(2) Ca. temp. Finch, 102.

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been acquired subsequently to the notice of the fraud was immaterial, provided there was no such notice at the time when the consideration was paid.

* * * * *

July 7.

THE MASTER OF THE ROLLS :

The defendant is a purchaser for valuable consideration from persons claiming title under Meredith, who entered into possession of the property in question as the devisee of Jones, the rightful owner.

The legal estate was outstanding in a satisfied mortgagee under Jones ; and the mortgagee, by the direction of Meredith, whom he believed to be such devisee, conveyed the legal estate to Hall, by way of better security to Hall for money advanced by him, by way of mortgage, to Meredith. Meredith died in possession, having devised the property to his wife, who devised to the parties under whom the defendant claims as a purchaser for valuable consideration. The conveyance to Hall by the satisfied mortgagee of Jones recites the fact of the mortgage, and that it was satisfied, and that Meredith was the devisee of Jones, and that the conveyance of *the legal estate to Hall was made by the direction of Meredith. Meredith, therefore, and those who claim as volunteers under him, could have no title against the plaintiff as heir-at-law of Jones.

[*598]

The question is, whether the defendant, claiming as a purchaser for valuable consideration without notice of the plaintiff's title as heir, can protect herself by the legal estate which she has acquired by the conveyance from Hall.

My impression at the opening of this case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed ; but, upon full consideration of all the authorities which have been referred to, and the *dicta* of Judges and text-writers, and the principles upon which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration without

notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence.

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That is the situation in which the defendant stands. There was no reasonable ground for suspicion that the will was forged: a long possession had followed the alleged devise, and no reasonable diligence could have led to a discovery of the forgery.

I must therefore declare, that, as to all sums of money advanced by the defendant on the security of this property previously to notice of the forgery, she is to be considered as a purchaser for valuable consideration without notice; and the accounts between the parties must be taken upon that principle.—Reg. Lib. A. 1833, fol. 1402.

[599]

JOHNSON v. KENNETT. (1)

(3 Myl. & Keen, 624—632; reversing 6 Sim. 384.)

1835.
Jan. 23, 24.
April 22.

Lord
LYNDHURST,
L.C.

Where an estate is charged generally with the payment of debts and legacies, and the debts have been paid, but not the legacies, the purchaser will not be bound to see to the application of the purchase-money. The taking of a general bond of indemnity, or of a bond of indemnity against the legacies only, will not raise the inference that the purchaser knew of the payment of the debts, or impose any liability upon him in respect of the legacies.

[624]

WILLIAM KENNETT, by his will, dated the 10th of December, 1808, gave an annuity of 50*l.* to his wife, and a legacy of 1,000*l.* to be paid to each of his three daughters at the age of twenty-one years or marriage; and subject thereto, and to the payment of his debts, he gave all his real and personal estate to his son Thomas Kennett, his heirs, executors, administrators, and assigns; and he appointed his said son executor of his will.

The testator died in May, 1809, leaving Thomas Kennett his only son and heir-at-law, his widow, and three daughters surviving him. Thomas Kennett proved the will, paid the testator's debts out of the personal estate, and entered into possession of the real estate of the testator.

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(1) *Forbes v. Peacock* (1846) 1 Ph. 717, 15 L. J. Ch. 31.

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In the year 1810 Thomas Kennett and his wife, by deeds of lease and release and by fine, conveyed the real estates to uses to bar dower; and he afterwards sold those estates in lots to different purchasers, without having made any provision for the payment of the annuity to the widow, or of the legacies to the daughters of the testator. To some of the purchase deeds the widow was a party, and released her annuity. Bonds of indemnity were given by Thomas Kennett to all the purchasers: some of the bonds were conditioned for indemnifying the obligees against the legacies specially, and others were general bonds of indemnity.

In the year 1823 Thomas Kennett assigned all his real and personal estate to a trustee for his creditors.

The bill was filed by the testator's daughters against Thomas Kennett, the trustee for the creditors, the purchasers of the estates, and the widow; and it prayed that the will might be established, and that the purchasers might be decreed to contribute, in proportion to the amount of their respective purchases, towards the payment of the legacies, and the providing of a fund for the payment of the annuity; or that the real estates might be sold for those purposes.

[*626] The bill alleged, that Thomas Kennett paid the testator's debts out of the personal estate; but it contained no charge that the purchasers knew that the debts had *been paid. The purchasers by their answer said, they could not set forth whether Thomas Kennett had or had not paid the testator's debts out of the personal estate; and they admitted that, at the time of their respective purchases, they had by the will, but not otherwise, notice, and that they believed that the annuity and legacies were well charged on the real estate, and that the same had not been, in any way, secured to be paid by Thomas Kennett; and they submitted that they were not bound to see to the application of their respective purchase-mones.

The case was heard before the Vice-Chancellor [6 Simons, 384], who was of opinion that the form of the conveyances, and the bonds of indemnity taken by the purchasers shewed that they were dealing with Kennett, the devisee, as owner of the estates subject to the legacies; and that the purchasers were therefore

bound to see to the application of their respective purchase-moneys. * * *

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The defendants, the purchasers, presented a petition of rehearing.

Mr. Preston and *Mr. Wray*, for the appellants [relied on the general rule], that where there is a devise or trust for payment of debts generally, or for payment of debts and legacies generally, the purchaser is not bound to see to the application of the purchase-money. * * *

Mr. Willcock, for a defendant in the same interest as the appellants. [628]

Mr. Wigram and *Mr. Roupell*, *contra* :

* * This case is not distinguishable from *Watkins v. Cheek* (1), where it was held, that if a purchaser deals with a vendor, who is devisee and executor under a will charging the real estate with the payment of debts and legacies, and the intrinsic circumstances of the transaction shew that the vendor does not intend to apply the purchase-money in satisfaction of the charge, the purchaser is liable. The very fact of taking bonds of indemnity against the legacies shews that the purchasers were dealing with the vendor, not in his character of executor, *but as a person who treated the property as his own, and who intended, or might be expected, to apply the purchase-money to his own benefit. The purchasers would have required no protection, if there had been subsisting debts, and the nature of the indemnity, which they did require and obtain, furnishes of itself irresistible evidence to shew that they knew of the payment of the debts, and that they might themselves become liable for the remaining charge of the legacies. [629] [*630]

Mr. Preston, in reply.

THE LORD CHANCELLOR (2) :

April 22.

In this case William Kennett, by his will, gave an annuity of 50*l.* a year to his wife, and a legacy of 1,000*l.* to each of his

(1) 25 B. R. 181 (2 Sim. & St. 199).

(2) Lord Lyndhurst.

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three daughters; and, after making other dispositions in his will, he charged his debts and legacies generally upon his real estate. He died in the year 1809. It appears that his debts were paid out of his personal estate. In the year 1810 the real estate was sold in different lots; and the question is, whether the real estate in the hands of the purchasers is liable to payment of the annuity to the widow, and of the legacies given to the daughters.

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The general rule, as to which there is no dispute, is this. Where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the purchase-money. Where debts are charged generally, or where debts and legacies are charged generally, the purchasers of the real estate are not bound to see to the application of the purchase-money. The real estate *being, in this case, charged generally with the payment of debts and legacies, would not, therefore, *primâ facie*, in the hands of a purchaser, be liable to the payment of the legacies; but it is said that the debts having been paid, and paid out of the personal estate, and nothing remaining but the legacies, the case falls within the general rule applicable to cases where legacies alone are charged upon the real estate.

I find no authority for such a proposition. The rule applies to the state of things at the death of the testator; and if the debts are afterwards paid, and the legacies alone are left as a charge, that circumstance does not vary the general rule.

In this case it does not appear when the debts were paid. I do not find it charged in the bill, that the debts were paid previously to the sale of the real estate. There is no charge in the bill that the purchasers knew that the debts had been paid; no allegation that can raise the question whether they had or had not notice of such payment. On the face of the bill the case is the mere general case of real estate charged with the payment of debts and legacies. It is said that, from the nature of the transaction, the purchasers must have been aware that the debts were paid, because bonds of indemnity were taken by them against the legacies only, no mention being made of debts. But this is not correct as a general statement; for I have looked at the bonds, which were handed up to me, and it appears that

some of them mention the legacies only, but some are mere general bonds of indemnity. I lay no stress, however, on that circumstance; for it does not appear to me that, if all the bonds of indemnity had been taken against the legacies *only, that would at all vary the case. It would have been quite idle to mention the debts in the bonds, because, if there were any debts, it was clear that the parties were indemnified.

I am of opinion, therefore, that the judgment of the Vice-Chancellor must be

Reversed.

PARROTT v. PALMER.

(3 Myl. & Keen, 632—646.)

Where the lord of a manor, who claims against the tenants the right of property in the mines within the manor, has stood by for a long period and allowed the tenants, without objection, to work the mines and to expend large sums of money upon their mining operations, the Court will not assist him by making a decree for an injunction or account against the tenants, but will leave him to his legal remedy.

THE bill in this case was filed by the lord of a manor against certain of the tenants of lands within the manor, and also against the lessees under those tenants. It prayed an account of the quantity of coal, iron-stone, and other minerals worked and raised by the defendants, the tenants, or by other persons by their permission, out of the lands or mines lying within the manor, and of the profits derived therefrom; that the defendants might be decreed to pay the full value thereof to the plaintiff; and that they might be restrained by injunction from working such mines, and digging or removing such minerals in future.

The decree of the MASTER OF THE ROLLS, made at the hearing of the cause, directed that the bill should *be retained for a year; that the plaintiff should be at liberty to bring an action of trover against the tenants, for the purpose of trying the right; and that the defendants in that action should admit, upon the trial, that they had, within a year, raised or procured coal, iron-stone, or other minerals out of the lands in question.

The defendants, the tenants, appealed against the whole of

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*
KENNETT.

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1834.
Nov. 6, 7, 11.

Lord
BROUGHAM,
L.C.

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PABBOTT his Honour's decree ; but the other defendants, the lessees, did
 " not appeal.
 PALMER.

Sir W. Horne, Mr. Knight, and Mr. Whitmarsh, in support of the decree.

Sir E. Sugden, Mr. Jacob, and Mr. Richards, for the appeal.

The *Solicitor-General* (*Mr. Rolfe*) and *Mr. Preston* appeared for the lessees :

[*684] The points upon which the appellants relied, were principally four : first, that the lands in question were not copyhold, but customary freehold, and that the law which gave the lord the right to the soil, and to whatever lay below the surface of the ground, in copyholds, did not extend to customary freeholds ; secondly, that by the special custom of this particular manor, or by long and uninterrupted usage, the tenants were entitled to dig for and take the minerals ; thirdly, that the plaintiff's remedy was exclusively at law ; and, fourthly, that at all events the plaintiff, by standing by for a long period, and permitting the defendants to expend large sums of money in the erection of buildings and machinery for working the mines, and by his subsequent *laches* in applying to the Court, had precluded himself from *obtaining an injunction, and that his title to an account depended on his title to the injunction. [The judgment on this appeal turned upon the 4th point, which makes it unnecessary to refer to the numerous cases cited on the other points.]

Nov. 11. THE LORD CHANCELLOR :

[635] The questions in this case were raised by the plaintiff, who, as lord of the manor of Oldbury Walloxall, otherwise Langley Walloxall in the county of Warwick, filed his bill in the year 1824 against the defendants, some of whom are tenants of the manor, and others, lessees under those tenants, of the coal and ironstone mines appertaining to the customary tenements. The lord, denying that there was any custom which entitled the tenants to the minerals, prayed an injunction and account.

In the Court below both classes of defendants appeared and

contested the point, but the tenants only have appealed; and it is admitted that they have themselves done no act with respect to the minerals beyond leasing them to, and receiving rent from, those other defendants who have not appealed.

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The defence set up by the answers was that the tenants hold according to the custom of the manor, and not at the will of the lord; and that they have by the custom a right to dig and take the minerals; that this right has always been exercised by them, and those whose estates in the customary tenements they now have; and that, until the bill was filed, they were never forbidden or in any way interrupted in their operations, although these were sufficiently public and notorious; and they claimed not only to be exempt from the injunction, but also that no account should be decreed, or, if any, that it should not go back beyond the filing of the bill, or at all events not beyond the period of six years, to which the Statute of Limitations would confine all such claims at law.

Issue being joined, witnesses were examined, and other evidence given; and, the cause having come on for hearing at the Rolls in the month of November, 1832, his Honour was pleased, by his decree, to order that the bill be retained for twelve months, with liberty for the plaintiff to bring an action of trover against the defendants, the tenants of the manor, who were ordered to admit the taking, within a year past, of coal and ironstone from under their copyhold tenements.

[636]

From this decree, the other parts of which were merely formal and consequential, the present appeal is brought; and several important questions, as well of fact as of law, having been raised before me, I shall proceed first of all to state my opinion upon the former, because the conclusion at which I have arrived, respecting the facts, precludes the necessity of deciding some of the points of law made, and enables me to dispose of the others.

I entirely agree with his Honour that, generally speaking, a custom should not be tried here, but should go before a jury. The defence, however, resting in this case upon long use, which was uninterrupted, assumes another shape, and goes to the equity of granting either of the things prayed by the bill, namely, account and injunction, after one party has stood by

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for so long a period, and suffered the other to expend money and bestow labour upon the disputed operations. In this view it becomes absolutely necessary to examine the conduct of the parties, with a wholly different object from that of proving or disproving the custom which the defendants set up, and which the plaintiff by anticipation traverses; although much of the evidence may be of a kind which makes it common to both questions, and subservient to the purposes of each. It thus happens that I shall *inquire concerning the acts of the customary tenants, without at all disposing of, or indeed touching, the issue with respect to the disputed custom.

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A considerable portion of evidence has been given by the defendants as to the digging of clay and cutting of trees, which I do not think at all decisive of any question touching the mines of coal and iron; though certainly it is not unimportant even with reference to that question, because it shews a constant practice of dealing with timber and subsoil, things generally in the lord. For thirty or forty years past, and according to one witness, for fifty or sixty, clay is shewn to have been dug by various tenants of the manor, for the purpose of openly making bricks at kilns within the manor, but which were sold out of the manor. Timber trees, in considerable number and of some value, were cut; in one place 120, the finest in the county; and these were sawed into planks for the use of the collieries that were worked by the tenants.

The coal workings however form a far more important consideration. It is satisfactorily proved that Messrs. Parker & Co. worked coal and iron mines for thirty years, and Messrs. Wright and Danks, for forty years, in the Oldbury field; and that their operations were carried on openly, five or six boats in a day being loaded on the canal with the coal got. These workings are proved, I think, by six witnesses of various descriptions and ages, including one who, previously to the year 1820, had been steward of the manor. Their testimony shews that the mining operations were carried on in the face of day, only 300 yards from the house where the Manor Courts were holden, and close by a turnpike road; that two persons called benchers, and employed to value for the lord, lived on the spot, the *one for

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ten, the other for twenty years; and that the lord's bailiff lived there for ten years. The steward himself states that the lord and lady of the manor knew of the tenants taking the minerals, and yet never gave any directions to obstruct, or even to prohibit or warn them against doing so. He also says that he knows that the customary tenements were sold so much the dearer on account of the mines supposed to be under them and accessible to the tenants, and that the minerals were worked openly, and for sale, by those to whom the tenants demised them.

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PALMER.

Some evidence is also produced from the records of the Manor Court. A tenant, in the year 1809, devised his tenement to trustees in trust, to sell the coal and ironstone under it, which they did for the sum of 600*l.*: so late, however, as the year 1820. The purchaser was not admitted as tenant in respect of those minerals; but it is certain that the steward was cognisant of the will and the sale, by the enrolment of the former. This transaction, which, had it happened earlier would have been very important, took place only four years before the suit commenced. Its materiality is lessened by this circumstance; nevertheless it throws no light burthen of explanation upon the plaintiff, who lay by for four years after so important an assertion of adverse right.

But another fact exists in the cause, and of a much earlier date. One tenement is conveyed by surrender, and the surrenderee is admitted on the Court Rolls, on the 25th of October, 1803, with an express reservation, on the part of the tenant, of "the mine or mines of coal or iron-stone that may be under the same." Several other surrenders of the same tenements, in like manner and with the like reservation, appear entered on the Court Rolls, from that time down to the 5th of *April, 1814. The steward, then, by the most authentic evidence, that of the Court Rolls, and, therefore, the lord also whom he represents, is thus fixed with knowledge of the fact, that one tenant of his manor had been asserting his right to the minerals, and dealing with them as his property for above twenty years, and another for above four years, prior to any steps being taken against any of the tenants, and without any assertion, on the lord's part, of a

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right, or any preferring of a claim at all inconsistent with the pretensions of the copyholders. It is lastly in evidence, that upwards of 35,000*l.* have been expended in the working and machinery of these mines, in the long period of considerably more than thirty years, during which the defendants or their lessees worked these mines; and that the lord and his agents saw them work the mines without offering any opposition, giving any warning, or pretending any title to dispute rights so asserted and so acted upon for a course of so many years and in the face of day.

The first conclusion, which I build upon these facts, admits of no doubt at all. This is a case which will not allow the mention of injunction. Not that by the nature of the question that relief is excluded: for the case of *Dench v. Bampton*, before Lord Loughborough (1), is clearly not law; and independently of its having been overruled a few years afterwards, in the case of *Richards v. Noble* (2), the principle on which Lord LOUGHBOROUGH proceeded has never been considered a sound one, namely, that the only remedy of the lord for waste done by the tenant in cutting timber without licence or custom, is at law, for the forfeiture, a doctrine laid down by his Lordship in a case of timber, but which he clearly applied to mining and all other waste *as well. I am clearly of opinion, therefore, that there is nothing in the nature of the case to exclude the relief, by way of injunction, for which this bill prays.

[*640]

But I am equally clear that the party complaining has in this particular instance, by his own conduct, disentitled himself to that relief. If there be any thing well established in this Court, it is that a man who lies by, while he sees another person expend his capital and bestow his labour upon any work, without giving to that person notice, or attempting to interrupt him,—one who thus acquiesces in proceedings inconsistent with his own claims,—when he comes to enforce those claims in this Court, shall in vain ask for its interposition by an injunction, of which the effect would be to render all the expense useless, which he voluntarily suffered to be incurred. Here more years have been allowed to elapse than the number of weeks which would

(1) 4 Ves. 700.

(2) 17 R. R. 168 (3 Mer. 673).

have closed the doors against the plaintiff coming to seek an injunction.

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[His Lordship then dealt with the question whether an account could be obtained in equity where no injunction was possible, and continued as follows:]

It is then to be considered whether or not the same *laches* does not disentitle him to an account; and I am of opinion that it does. Shall a party stand by and see others laying out their money for thirty or forty years upon works, without giving them any warning at all—see all this and say nothing—look on and “make no sign,” while perhaps the trade is a doubtful or losing concern; and then, when the speculation has proved successful, come for an account, that is, a share of the profits? By no means. Had no ore been got, had the coals found no vent, had the smelting house which the plaintiff suffered to be erected, blazed in vain, and the machinery which he let his tenants erect with the finest timber trees in the county, growing on the copyhold tenements, failed to drain the field of coal, and to raise a saleable commodity, he never would have asked for an account—he never would have asked that the loss upon the concern might be shared between him and the undertakers.

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*And shall he now be suffered to come into this Court, and going back long before his suit gave the first intimation of his claim, the first warning of the tenant’s danger, invoke the aid of the Court in order to have the profits refunded? He shall not. The remedy in courts of law is open to him, and there, as the mere right alone comes in question, subject to the statutory period of limitation, he may obtain satisfaction from whatever wrong-doer has assailed his rights.

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I reserve for a subsequent head of argument the decisive authorities, all pointing the same way, of the cases, both at law and in equity, upon lapse of time.

The next inference which I deduce from the facts, and from the law of the case, is, that no account can be had prior to the filing of the bill at the earliest. To determine, however, whether the bill shall be entertained at all, and an account given even to that extent, we must look at the facts. If given against any one, it should rather be against the defendants who do not appeal,

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and against whom the decree makes no order, than against the appellants, who are shewn not to have taken any of the ore or coals. The law is clearly open to the plaintiff against them; and the decree only enables him to proceed against the appellants at law, by ordering them to admit a taking which is directly contrary to the fact.

[*645] I do not see what occasion there was to come into equity in this case,—none certainly as against the defendants who do not appeal, and who are the parties that have actually worked the mines; for against them trover lay, without the aid of this Court. As for the others, it is to be observed, that if no action will lie at law for money had and received by them to the plaintiff's use, *in respect of the rent which they have received from their lessees of the minerals, there cannot be a stronger reason for holding that, in the nature of the case, a bill here does not lie for the same receipt; and we are never to forget what applies to the case of both classes of defendants, that in *Sayer v. Pierce* (1) Lord HARDWICKE clearly held that he could not interfere, even in the case of mines, where no possession by the lord had been shewn.

The cases at law, especially *Curtis v. Daniel* (2), mainly favour this doctrine. It was there held that trover would not lie for ores dug by the customary tenants under their tenements, after twenty years' possession, by acts of ownership on their part, and none such within that time on the part of the lord. But, indeed, the doctrines laid down both by the MASTER OF THE ROLLS, and by Lords ELDON and REDESDALE in the Court of Appeal, in *Cholmondeley v. Clinton* (3), and on which the decision of that celebrated case turned, go the full length of the same conclusion in respect of title to equitable relief. * * *

[646] I am of opinion, therefore, that as against the defendants, the appellants, the bill should have been dismissed with costs. But I am inclined to think that regard being had to the time which has elapsed since the filing of the bill, I ought, in dismissing it, to place myself in his Honour's shoes, and do as he ought, perhaps, to have done, as to the other defendants who have not

(1) 1 Ves. Sen. 232.

(3) 22 R. R. 83 (4 Bligh, 1).

(2) 10 R. R. 291 (10 East, 273).

appealed. I mean that on this I shall take further time to consider whether the suit should be dismissed, but with leave to bring trover; and that the defendants should be restrained from setting up the Statute of Limitations, as to any thing done since the filing of the bill.

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In thus disposing of the cause I feel very easy as to the question, whether any thing is excluded which could have advantaged the plaintiff, had the decree stood, and the action of trover been tried. Even with the somewhat extraordinary admissions imposed upon the appealing defendants, I feel certain that no jury would ever have found for him, in the face of such evidence of *laches*, indeed of acquiescence, as this case abounds with; and I am persuaded, that the end now made of the case, (for I hardly expect any action to be tried against the other defendants,) will only prevent a delay of final settlement and peace between the parties, and preclude a very fruitless renewal of litigation in both Courts.

THE ATTORNEY-GENERAL v. THE CORPORATION OF NEWBURY.

(3 Myl. & Keen, 647—655.)

Principles upon which the account is to be taken against corporations, who are trustees of charities, and have misapplied the funds.

1834.
Mar. 5, 27.

Lord
BROUGHAM,
L.C.
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THIS was an information praying that an account might be taken of the rents and profits of the estates devised to the defendants, the corporation of Newbury, by the will of one John Kendrick, upon certain charitable trusts; and that a scheme might be settled for the future administration of the charity.

The VICE-CHANCELLOR's decree having, among other things, directed the Master to take an account of the rents and profits which had come to the hands of the defendants since the 24th of June, 1825, the informant appealed against that part of the decree.

In assuming the 24th of June, 1825, as the point from which the account should commence, his Honour had followed the

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analogy furnished by a decree made by the LORD CHANCELLOR, upon another charity information, in which the same corporation were the defendants, and which was filed for the purpose of having the accounts taken of certain estates, belonging to a charity known by the name of Cowslade's charity. The decree of Sir JOHN LEACH in that suit, which had not given the account beyond the time of filing the information, was so far varied by the LORD CHANCELLOR on appeal, that the Master was directed to carry back the account to the 24th of June, 1825, that being the date of the last appointment of trustees, nominated by the corporation to administer the charity.

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The petition of appeal submitted, that as there had not been (as in the case of Cowslade's charity) any distinct appointment of trustees for the management of Kendrick's charity, which had continued, from its earliest institution, to be a trust vested in the corporation at large, who had mixed the funds belonging to that charity with their other corporate funds, the decree made with respect to Cowslade's charity had no bearing on the present case; and that the account ought to have been carried back to the date of the foundation.

The leading facts of the case as well as the different topics of argument urged, and the authorities cited in support of the appeal, are stated and considered in the judgment.

Sir W. Horne and Mr. O. Anderdon, for the appeal.

Sir E. Sugden, contra.

March 27. THE LORD CHANCELLOR :

John Kendrick by his will dated the 29th of December, 1624, after bequeathing certain sums to the corporation of Reading, bequeathed 4,000*l.* to the corporation of Newbury, upon trust to buy therewith a commodious house within the said town, to set the poor on work, and with the residue to make a common stock for the employment of the poor in such house, according to the discretion of the corporation, and the trusts he had before declared of his bequest to the corporation of Reading.

The corporation of Newbury having obtained the usual licence,

in the 2nd of Charles I., they purchased *on the 8th of June, 1626, the tenement in Newbury called The Castle, and a small plot of land, for 350*l*. On the 26th of February, 1638, a small estate called The Wash was conveyed to them in consideration of the sum of 241*l*. To this purchase they afterwards added another, of a lease from the chapter of Windsor, of a meadow called Nepitts, for a term of twenty-one years; and they also built a workhouse.

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In the month of June, 1677, a resolution was entered into by the corporation, that the money bequeathed by John Kendrick should be employed according to the trusts of his will, and that, in the absence of any particular direction, it should be employed for the benefit of the poor inhabitants of Newbury, in such manner as the deputy steward should advise, with safety to the corporation.

At another meeting, holden on the 1st of February, 1706, it was resolved to establish a charity school, with the said funds, the master of which was to receive 30*l*. per annum; and certain trustees were to be appointed for the due management thereof.

This school was kept up for many years; but after the establishment of a national school at Newbury, the boys were in the year 1827 removed thither, and the sum of 20*l*. per annum was paid to the master for their instruction. In the year 1829 the number of boys was nineteen.

In the year 1793 the corporation demised part of the lands purchased under the trust, together with other lands, to the undertakers of the Kennett navigation for twenty-nine years, and upon the expiration of the lease, received a sum of 1,789*l*. for dilapidations. The trust estates now yield an income of 310*l*. per annum.

There are also two small bequests by Nicholas Clement and Thomas Stockwell towards the support of the same school.

[650]

This information was filed in Hilary Term, 1830, for an accoun and a scheme.

An information had been filed in Trinity Term, 1829, against the same corporation, with the view of obtaining the like relief against them, with respect to a charitable bequest made by

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Richard and Thomas Cowslade, deceased. Upon the answer to that information coming in, the relators finding that some of the grievances complained of formed the subject-matter of both suits, owing to the mode in which the corporation accounts had been kept, amended the present information, and made Mr. Hazell, the chamberlain, and Mr. Baker, the town clerk, parties.

The VICE-CHANCELLOR dismissed the information against two of the defendants, Hazell and Baker, and ordered their costs to be paid out of the charity funds, without prejudice to the question by whom they should be eventually paid; and he directed an account to be taken from the 24th of June, 1825.

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It is unquestionable that where trustees of a charity have, through real mistake, and without any corrupt motive, misapplied the funds under their care, their conduct will be considered with a lenient disposition, if not in a favourable light; and that they will not be visited as if they had knowingly and wilfully diverted the fund from its proper uses. This has been often laid down in the cases before the Court; and it is distinctly, and more than once, stated in *The Attorney-General v. Corporation of Exeter* (1). The circumstance of the trustees being a corporate body, should certainly rather increase the disposition towards a lenient construction of their proceedings; and, although in contemplation of law, the identity of the body is preserved through ages, yet misdeeds alleged to have been committed long ago are only to be visited upon those of the present generation, when there exists no doubt of the misfeasance. In point of law, the body is precisely one and the same; but no strictness of legal principle can prevent us from at least exacting very clear proof of a case, when in point of fact parties between whom there subsists but a slender kind of privity are made answerable for each other's acts.

On the other hand, we must be careful not to admit any relaxation of principle which would open the door to boundless abuse, and especially in bodies from their very nature so prone to all kinds of negligence and misconduct. Such a door would assuredly be flung open, were the Court to hold that nothing

(1) 26 R. R. 2 (2 Russ. 45).

short of corruption could fix a corporation with the consequences of acts done in old time. It is a misfeasance, and a serious one, for any trustees, be they individuals or corporate bodies, be they corporations aggregate or sole, who are intrusted with different funds, to mix them together, and thus divert into one channel the bounty which was destined to flow in another. The founder of a charity has an unquestionable right not only to direct that his funds shall be applied to the particular purpose which he has selected and declared, but to prohibit, by that specification, their application to any other purposes: and the case may easily be figured of a founder being more averse to the one application, than he is favourable to the other,—of a person placing a fund in the hands of *trustees who have or may afterwards obtain the management also of other funds destined to objects most hateful in the eyes of the first donor; objects rather than further which, he would greatly prefer throwing his property into the sea. If the trustees, in such a case, were to mix the funds together, no goodness of intention, supposing them to be cognisant of the confusion they were effecting, could excuse them; and the expenditure of the whole property on public purposes, though it might relieve them from moral imputation, could not exculpate them, in the eye of the law, from the charge of abusing their trust.

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NEWBURY.

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In the present case a sum of 4,000*l.*,—a sum considerable at any time, and large in the early part of the 17th century,—was left to the corporation of Newbury, to be employed in purchasing commodious premises, wherein the poor might be set to work, according to the discretion of the corporation. The Court is not here called upon to say what might have been the consequence, had the corporation neither purchased premises, nor set the poor to work, with the fund, but used it in some other manner, though for public purposes; because a purchase was made soon after the decease of the testator, and with so large a portion of the fund that the yearly value now amounts to a considerable sum, and accommodation for the poor and the means of setting them to work were provided.

That the whole of the yearly income of the residue over the purchase money may not have been employed strictly according

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to the provisions of the will, is very likely. But this seems to be no case for so extraordinary and so severe a proceeding as carrying back the account to the date of the bequest, or even for any great number of years, as we might be entitled to do were it clearly *shewn at what time plain misappropriation had commenced without an excuse of misapprehension, or of failure of objects. Neither do I consider that we are entitled merely to state the fact of the fund having been blended with other charitable estates in the keeping of the same trustees, and then to call on the corporation to shew when they began to mix the different funds, and go back either to the foundation of the charity, or to some intermediate and arbitrarily assumed point of time, in default of the corporation specifying the era when blending or other misapplication commenced. The cases that have been referred to [his Lordship here referred to a number of cases which had been cited] do not, I apprehend, warrant any such doctrine.

Upon the whole circumstances of the case, which I have taken time to weigh, and with some jealousy excited towards the conduct of the corporation in compounding together funds which they certainly ought, on every account, to have kept apart, and having regard especially to the period to which the decree in the latter case carried back the account to Cowslade's charity, I have arrived at the same conclusion to which his Honour came, and I think the account should go no further back than the month of June, 1825.

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Having stated that there are circumstances of extenuation in the case of corporations acting *bonâ fide* and *under honest mistake, or in the difficulty of finding objects, it may be added that no such alleviating topic can ever be allowed to enter into the consideration of the Court, in cases where plain neglect, much more, wilful breach of trust, has been committed. The corporation is answerable as such, and the identity of the body, preserved through ages, makes it answerable, at any given time when the malversations are inquired of, for the proceedings which may have been had at a distant period.

It is of no consequence that the individuals now sustaining the corporate character, enjoying the immunities, and exercising the

functions of the corporation, are wholly different from those who did the wrong, or who permitted the neglect, and are only connected with them through the medium of a common municipal character. This is the condition inseparably annexed to their corporate character; and the individuality of the body politic, with all its incidents, is thus maintained as perfectly in the system of jurisprudence, as the identity of the natural body is preserved entire in the system of the world. All who become corporators are, or should be, aware of the duties which they undertake, and the liabilities under which they come, or rather of the liabilities in the corporation to the management of whose affairs they voluntarily succeed. As individuals they never can be made responsible for what others have done or omitted to do: but in their hands, and under their administration, the abuses of former corporators, that is of the same corporation in former times, may fall upon the corporate property. As far, too, as regards the character of existing individuals, no blame is imputable to them for the offences or the negligence of their predecessors. But even all suspicion will be wiped away from them, and they will entitle themselves to public *praise and to public gratitude, in proportion as they shew their readiness to investigate and to correct the abuses of former times, to restore to their proper uses whatever funds may have been diverted, to eradicate imperfections which may have grown up, and to secure, by an exact and faithful administration of the trust reposed in them, those advantages to the rights and the comforts of their fellow citizens, which were the object of all such foundations.

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Decree affirmed (1).

(1) See *The Attorney-General v. The Bailiffs of East Retford*, 39 R. R. 124 (2 My. & K. 35).

884.

*July 7.**Rolls Court.*
LEACH, M.R.

1835.

*June 8, 29.*Before the
LORDS COM-
MISSIONERS.

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PARROTT v. SWEETLAND.

(3 Myl. & Keen, 655—666.)

A vendor, in lieu of the price of 3,000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of her intended husband and herself, in case the purchaser should so long live, the purchaser engaging that his personal representatives should within three months after his decease, in certain events, but not in all events, pay a further sum of 3,000*l.* This is not a security, but a substitution for the price; and the lien of the vendor on the land is discharged.

THIS was a bill filed by the vendor of an estate and premises in the county of Devon, praying the specific performance of his contract by the purchaser.

It appeared from the abstract of title delivered to the solicitor for the purchaser that, in the month of May, 1831, the premises in question were subject to a mortgage in fee to a person of the name of Kingwell: and that the plaintiff Jasper Parrott was entitled to the equity of redemption of the premises, for his life, with remainder to Sophia Parrott his eldest daughter and her heirs.

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By indentures of lease and release, dated respectively the 4th and 5th of May, 1831, and made between Sophia Parrott of the one part, and Jasper Parrott of the other part, after reciting that Sophia Parrott, for the considerations thereafter mentioned, was desirous of conveying and assuring unto Jasper Parrott, his heirs and assigns, her remainder in fee simple of and in the hereditaments subject to the mortgage, and also of assigning unto Jasper Parrott the surplus of any purchase-money to arise from the sale of the hereditaments and premises, in case Kingwell, his heirs or assigns should thereafter make sale of the same, he, Jasper Parrott, entering into the covenant thereafter contained for indemnifying Sophia Parrott, her heirs, executors, administrators, and assigns from all liability to pay the mortgage-money and interest, and all other her and their liability whatsoever under the covenants in the indenture of mortgage; it was witnessed, that in consideration of the premises, and particularly of the covenant, on the part of Jasper Parrott, therein contained, for indemnifying Sophia Parrott in the manner therein expressed; and also in consideration of the sum of 3,000*l.* advanced, or

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agreed to be advanced or secured to Sophia Parrott, in contemplation of her intended marriage with Richard Languet Orlebar, by Jasper Parrott to Sophia Parrott, or Richard L. Orlebar, upon the terms expressed in a bond, bearing even date therewith, she, Sophia Parrott, granted, bargained, sold, released, and confirmed unto Jasper Parrott and his heirs, all that her remainder, expectant on the decease of Jasper Parrott, of and in the premises; to hold, subject to the said life estate, and the said mortgage, unto Jasper Parrott, his heirs and assigns for ever. And it was thereby further witnessed, that for the considerations thereinbefore expressed, she, Sophia Parrott, assigned unto Jasper Parrott all her interests in the monies which *might arise from the sale of the premises comprised in the mortgage. And it was further witnessed that, in consideration of such conveyance and assignment, and in pursuance and performance of the agreement of Jasper Parrott in that behalf, he, Jasper Parrott, covenanted with Sophia Parrott, that he should and would take upon himself, and pay and satisfy the whole of the principal money and interest due on the mortgage.

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On the indenture of release was indorsed a receipt, signed by Sophia Parrott, in the following words: "Received on the day and year first within written, of and from the within named Jasper Parrott, a bond for the sum of 3,000*l.*, being the full consideration within expressed to be given by him."

The bond referred to in the receipt was a bond under the hand and seal of Jasper Parrott, of even date with the release, and was for payment of the penal sum of 6,000*l.* to Richard L. Orlebar. This instrument recited the intended marriage, and that, by the settlement made in contemplation of such marriage, an allowance for pin money, and a jointure, had in the events therein mentioned, been settled for the benefit of Sophia Parrott; and that, on the treaty for such marriage, it was also agreed that, if the marriage should take effect, he, Jasper Parrott, should, during the life of the survivor of himself and his wife, pay to R. L. Orlebar, or to Sophia his intended wife, in the event of her surviving him, the sum of 100*l.* per annum by half-yearly payments, if required; and also, that his executors and administrators should, in the event of there being any child or children of

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R. L. Orlebar, by his intended wife, living at the time of the decease of the survivor of them, Jasper Parrott and Sophia his wife, unto R. L. Orlebar, and in case of his decease before any child was born, *and such child should be born alive, but not otherwise, in due time after his decease, to Sophia his intended wife, and in case of the death of R. L. Orlebar and Sophia his intended wife, to the child or children, if any, of the intended marriage, the sum of 3,000*l.* The condition of the bond was, that, if the marriage should take effect, and J. Parrott, his executors or administrators, should pay or cause to be paid unto R. L. Orlebar, or his assigns, the sum of 100*l.* per annum during his life, and, in case of his death, to Sophia his intended wife, the like sum of 100*l.* per annum during her life (which said annual sums should be paid by half-yearly payments if required) ; and also, if the executors or administrators of J. Parrott should pay, or cause to be paid within three months of the time of the decease of the survivor of them J. Parrott and his wife, the sum of 3,000*l.* unto R. L. Orlebar, if living, and there should be issue at that time by such intended marriage, but in case R. L. Orlebar should die in the lifetime of the survivor of J. Parrott and his wife, leaving issue of the intended marriage, or born alive within due time after his death, then if the executors or administrators of J. Parrott should pay the said sum of 3,000*l.* unto Sophia the intended wife of R. L. Orlebar, and in case of the death of R. L. Orlebar, as well as Sophia his intended wife, in the lifetime of the survivor of J. Parrott and his wife, then, if the said sum of 3,000*l.* was paid unto the child or children, if any, of the intended marriage, within three months from the death of the survivor of them, J. Parrott and his wife, the obligation was to be void. And it was also to be void, so far as regarded the payment of the said sum of 3,000*l.*, in case J. Parrott should, by any deed, or by his last will and testament, or by any codicil thereto, give or bequeath unto R. L. Orlebar, in case he should be living at the time of the death of such survivor, but if he should be *then dead, to Sophia his intended wife, any freehold or personal property or effects to the amount of 3,000*l.*, exclusive of any provision to which Sophia the intended wife, or any child or children of her, might become entitled under the

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settlement made on the marriage between J. Parrott and his wife, or any power therein contained; otherwise it was to remain in full force and virtue. PARROTT v. SWEETLAND.

The marriage between R. L. Orlebar and Sophia Parrott was solemnized immediately after the execution of these instruments.

The defendant, by his answer, insisted, that the parties interested in the sum of 3,000*l.* mentioned in the release and bond, had a lien in respect of that sum on the premises contracted to be sold; but he admitted that all other objections to the title had been waived.

Mr. Pemberton, Mr. Preston, and Mr. Bacon, for the plaintiff, contended that the vendor's lien was an equity which prevailed only as between vendor and vendee, and could not be extended so as to operate for, or against a stranger to the transaction. * * The bond was to be the only security, and was utterly irreconcilable with the idea of any lien being retained: *Winter v. Lord Anson* (1), *Mackreth v. Symmons* (2), *Clarke v. Royle* (3), the last of which cases was not to be distinguished from the present case. [*660]

Mr. Bickersteth and Mr. Shapter, for the defendant :

* * It has never yet been decided that the vendor's lien does not extend to third parties; and no reason founded on principle can be suggested why it should not. * * When *Clarke v. Royle* was decided by the VICE-CHANCELLOR, his Honour proceeded expressly on the authority of the original decision in *Winter v. Lord Anson*, not being aware at the time (for the case had not then been reported on the appeal) that Lord LYNDHURST had in that case reversed the decree of the Court below. [*661]

THE MASTER OF THE ROLLS:

It is clearly settled that a mere security for the payment of the price stated in a conveyance will not discharge the lien which courts of equity give to a vendor, where the price is

(1) 24 R. R. 205; 27 R. R. 117
(1 Sim. & St. 434; 3 Russ. 488).

(2) 10 R. R. 85 (15 Ves. 329).
(3) 30 R. R. 193 (3 Sim. 499).

PARROTT unpaid. The security is considered as simply for payment of
 the price ; and, if the price be not paid, the lien remains.
 SWEETLAND.

The question in this case is, whether the transaction between the vendor and vendee was a security for the price, or a substitution for the price. The consideration stated in the conveyance was the sum of 3,000*l.* ; but the contract of the vendor and vendee was that, in lieu of the sum of 3,000*l.*, the vendor should accept an annuity of 100*l.* payable during the lives of the vendor and her intended husband, if the vendee should so long live ; and that his personal representatives should, within three months after his decease, in certain events only, but not in all events, pay the further sum of 3,000*l.* This arrangement is carried into effect by the bond of the vendee conditioned accordingly ; and the receipt indorsed on the purchase deed is in these words : “ Received, on the day and year first within *written, of and from the within named Jasper Parrott, a bond for the sum of 3,000*l.*, being the full consideration within expressed to be given by him.”

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It is plain, therefore, that this is not the case of a security, but a substitution for the price, which the vendor has agreed to accept, and that the lien for the purchase-money is consequently discharged.

1835.
 June 8, 29.

The defendant having presented a petition of rehearing against the decree of the MASTER OF THE ROLLS, the cause came on for argument before the Vice-Chancellor, Sir Lancelot Shadwell, and Mr. Justice Bosanquet, sitting as Lords Commissioners.

Mr. Preston, Mr. Jacob, and Mr. Bacon, in support of the decree.

Mr. Tinney and Mr. Tyrrell, for the appeal.

The same topics of argument as had been addressed to the Court below were urged at great length on the rehearing. The following additional authorities were cited and commented upon : *Pollexfen v. Moore* (1), *Fawell v. Heelis* (2), *Tardiff v. Scrughan* (3),

(1) 3 Atk. 272.

(2) Amb. 724.

(3) Stated 1 Br. C. C. 422.

Comer v. Walkley (1), *Nairn v. Prowse* (2), *Hughes v. Kearney* (3),
Elliot v. Edwards (4).

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LORD COMMISSIONER SHADWELL, in delivering the judgment
 of the COURT, after stating the facts of the case, *and
 the deed of release, and the receipt indorsed upon it,
 proceeded :

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It then appears, that by an instrument of even date with the
 release, and which must be construed in the same manner, and
 as if it formed part of one entire transaction with it, the father
 became bound to the intended husband in the penal sum of
 6,000*l.* ; and the following condition was annexed to the bond :
 [His Lordship read the condition.] Upon the first reading of
 this instrument, the question naturally arises, whether any
 thing else was, or could be in the contemplation of the parties,
 than that the father, having regard to the circumstances of his
 property, should give a bond for payment of a sum of 3,000*l.* to
 such persons, and upon such contingencies as were therein
 expressed, with a power, nevertheless, to vary the arrangement
 at any time, on condition of his doing quite a different thing,
 namely, giving a fortune of 3,000*l.*, in one event to the husband,
 and in another event to the wife, exclusive of the children,
 and that the daughter should release the equity of redemp-
 tion to him, and that he, acquiring that equity, should of
 course take upon himself the payment of the mortgage debt.
 The whole of this transaction, it is obvious, was carried
 into effect with the approbation of the intended husband,
 who was content to accept the bond in question as the fortune
 of his wife.

In *Winter v. Lord Anson* (5) Lord LYNDHURST, in his judgment
 on the appeal, observing upon the circumstances of that case,
 said that as there was nothing in the transaction itself, as
 evidenced by the instruments, leading to a clear and manifest
 inference that such was the intention of the parties, he
 thought it should be *declared that the plaintiffs had a lien

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(1) Sugd. V. & P. 547, 7th ed.

(4) 3 Bos. & P. 181.

(2) 6 R. R. 37 (6 Ves. 752).

(5) 27 R. R. 117 (3 Russ. 488).

(3) 9 R. R. 30 (1 Sch. & Lef. 132).

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SWEETLAND. upon the estate in question for the residue of the purchase-money.

From that passage in his judgment, it is manifest that, in Lord LYNTHURST's opinion, the proper way of dealing with questions of this kind is, to look at the instruments executed by the parties at the time, and upon them to declare what the meaning of the parties must have been.

The present appeal has been argued as if it were a naked case of vendor and purchaser: but to us it rather appears to be a sort of family arrangement, entered into between a father and his daughter, together with her intended husband, and having for its object to provide for the wife and family, in a great variety of different modes according to different contingencies, and in a manner utterly inconsistent with the notion of a payment of purchase-money.

The 3,000*l.* which were to be paid by the executors of Mr. Parrott to Mr. and Mrs. Orlebar, in case either of them survived Mr. Parrott and his wife, was a *chose in action*, which might have been settled or dealt with by Mr. and Mrs. Orlebar in any way they pleased, without reference to the interests of their issue. It is clear, at any rate, that there were certain events in which the children might be entitled to the money, and that there were also other events in which the husband or wife might be so entitled; and it is manifest, therefore, upon the face of the bond itself, that the parties were really dealing for a totally different thing from an absolute sum of 3,000*l.*, the sum which is assumed in the appellant's argument to have been the consideration for the estate.

[665] The release contains no statement or recital of any agreement to sell the estate for the price of 3,000*l.*; and in the operative part, it is merely witnessed that in consideration of the premises and of the covenant, and in consideration of the sum of 3,000*l.*, advanced or agreed to be advanced or secured to Miss Parrott, in contemplation of her intended marriage with Mr. Orlebar, upon the terms expressed in a bond of even date, she, Miss Parrott, sold and conveyed the estate to her father. From these expressions it is obvious that the parties did not treat the consideration as a mere sum of 3,000*l.* And then the bond

itself is so framed, that the very receipt, which was given for it, testifies what was the real object of the parties. The acknowledgment indorsed upon the release, is not a receipt for the sum of 3,000*l.* as the consideration therein expressed, but it is, strictly and grammatically, a receipt for the bond given to secure that amount, being (that is, the bond being) the full consideration within expressed. Now, if it appears, as in our opinion it clearly appears, upon the face of these instruments, and from the nature of the transaction, that the parties were bargaining for a security, and not for a stipulated sum, no question of lien arises, because here the purchaser has actually received the consideration.

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SWEETLAND.

We therefore decide, in conformity with the very principle laid down by Lord LYNDHURST in *Winter v. Lord Anson*, (although upon the special circumstances in that case his Lordship came to an opposite conclusion as to the fact), that the objection to the plaintiff's title, set up by the appellant, on the ground of lien, cannot be supported.

We are of opinion that it is clear, upon the face of the instruments themselves, that the lady has got every *thing which she bargained for, that she was in effect paid by the receipt of the bond, and that the lien therefore does not exist.

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Decree affirmed without costs.

HUGHES v. TURNER (1).

(3 Myl. & Keen, 666—698 ; S. C. 4 L. J. (N. S.) Ch. 141.)

To operate as an execution of a power, a will must either refer to the power, or to the subject of it ; and a reference to part of the subject, or to some of many subjects of the power, will not be sufficient to make a will operate as an execution of the power, where there is no other indication of an intention to execute it.

1834.
July 25.
LEACH, M.R.
1835.
Feb. 24, 25.
April 16.
PEPYS, M.R.
[666]

MARTHA DAVIES, by her will dated the 13th of December, 1808, after charging all her real and personal estates with the payment of her debts and legacies, and giving some pecuniary legacies, gave, devised, and bequeathed all the [residue of her real and

(1) As to general powers see now s. 27 of the Wills Act (7 Will. IV. & 1 Vict. c. 26).

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TURNER.

personal estates, to John Hilton and John Oswald Trotter, upon trust to receive the income thereof, and pay the same to her sister Elizabeth Leighton Bonsall, for her separate use during her life, and upon her death to transfer the said trust premises to such persons as Elizabeth Leighton Bonsall should, by her will, signed and published in the presence of three or more credible witnesses, appoint. And in default of such appointment] upon trust for the said George Bonsall, his heirs, executors, and administrators. And the testatrix thereby appointed George Bonsall and Elizabeth Leighton Bonsall executor and executrix of her will.

[667]

The testatrix, at the date of her will, had no property in the county of Cardigan. In the month of February, 1812, she purchased an estate called Fynnen Wen, in the county of Cardigan; and she afterwards made a codicil to her will, duly attested to pass real estate, and dated the 5th of August, 1815 [whereby she altered some of the legacies given by her will, and substituted Sharon Turner as a trustee thereof, in the place of John Hilton, who had died].

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Martha Davies died in the month of October, 1815, leaving Elizabeth Leighton Bonsall, her sister and heiress-at-law [who became entitled as such heiress to the Cardigan property, and who was also entitled in fee to property in Middlesex].

George Bonsall and Elizabeth Leighton Bonsall, the executors, named in the will of Martha Davies, proved her will, and after having paid her debts and legacies, delivered over to the trustees the residue of her personal estate, with the exception of a few articles [including her piano and watch], which remained in the possession of Mrs. Bonsall, and with respect to which a material question was raised in this cause. The trustees also took possession of the real estates of the testatrix.

[673]

George Bonsall, the husband of Elizabeth Leighton Bonsall, died without issue, having made a will, dated the 15th of April, 1822, by which he devised the residue of his real estate, in the events which happened, to trustees for his sister, the plaintiff Mary Hughes, for her life, with divers successive remainders to persons made defendants to this suit. His heir-at-law was also made a party defendant: he died intestate as to his personal

estate, and the plaintiff, Mary Hughes, and other parties, defendants, were his next of kin.

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v.
TURNER.

On the 26th of October, 1829, Elizabeth Leighton Bonsall made a will, duly attested to pass real estate [whereby after various specific bequests she gave to her friend, Mrs. Scarborough, the sum of 500*l.*, and also a plain gold watch, which belonged to her (the testatrix's) sister, and she gave to her friend, Miss Hinds, her piano-forte and music-books, and she gave, devised, and bequeathed all her freehold and copyhold estates in the county of Middlesex aforesaid, and Cardigan, in the principality of Wales, and elsewhere, unto her relation, John Jones, his heirs and assigns for ever. And as to all the residue of her estates and effects, whether real or personal, and whether in possession, reversion, or expectancy, or held in trust for her, she gave, devised, and bequeathed the same, and every part thereof, unto the said John Jones, his heirs, executors, administrators, and assigns for ever; and she nominated the said John Jones and Jonathan Haynes, executors of her will].

The testatrix made a codicil to this will, dated the 14th of June, 1830, by which she gave to Sharon Turner 3,000*l.*, at his death to be equally divided between his family, and some other pecuniary legacies.

[675]

On the 25th of February, 1831, the last-mentioned will and codicil were proved by John Jones and Jonathan Haynes, the executors therein named, in the Prerogative Court of Canterbury.

The bill was filed by James Hughes and Mary Hughes, his wife, against Sharon Turner, the surviving trustee under the will of Martha Davies, against John Jones and Jonathan Haynes, the executors of Mrs. Bonsall, against the Rev. Isaac Bonsall, the administrator, with the will annexed, of George Bonsall, and against other parties, [including] those who claimed an interest in the personal or real estate of George Bonsall. * * The plaintiffs, by their bill, submitted that the residuary personal estate of Martha Davies became, in default of appointment, part of the general residue of the personal estate of George Bonsall, and that the same ought to be distributed between the plaintiff Mary Hughes and the defendants, the other next of kin of George Bonsall; and that the residue of the real estate of Martha

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v.
TURNER.

[*677]

Davies also became, in default of appointment, part of the real estate of George Bonsall, and belonged to the plaintiff Mary Hughes and the other devisees under his will, according to their respective interests therein. And the bill *prayed that it might be declared that the power of appointment, given by the will of Martha Davies to Elizabeth Leighton Bonsall, was never executed, and that the plaintiff Mary Hughes, and the other parties, defendants, according to their respective interests, might be declared to be entitled, in default of such appointment, to the residue of the personal and real estates of Martha Davies.

[The question in the cause for which this report is preserved was, whether the will of Elizabeth Leighton Bonsall, dated the 26th of October, 1829, was, or was not, a good execution of the power given to her by the will of Martha Davies.]

Mr. Pemberton and Mr. Richards, for the plaintiffs.

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THE MASTER OF THE ROLLS (LEACH, M. R.) decided that the will was a valid execution of the power.

1835.
Feb. 24, 25.

The cause was reheard before Sir Charles Christopher Pepys, Master of the Rolls.

Mr. Pemberton, Mr. Barber, Mr. Treslove, Mr. Tinney, Mr. Spence, Mr. Richards, Mr. Gordon, and Mr. Blake, in support of the petition of rehearing.

Mr. Beames and Mr. Spurrier, for the defendants Sharon Turner and Alfred Turner.

Mr. Bickersteth and Mr. Wilson, for the plaintiffs.

April 16.

[692]

THE MASTER OF THE ROLLS (1) [after stating the facts, and after disposing of a question which is not the subject of this report, said :]

[695]

It is clear that, by the will of Martha Davies, it was the duty of the trustees to convert all her property into money, and to invest the proceeds for the benefit of the parties interested. She died in October, 1815, and it appears that a gold watch and a

(1) Sir C. Pepys.

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piano-forte, and some music-books, which had belonged to her, remained in the possession of Elizabeth Leighton Bonsall at the date of Mrs. Bonsall's will in 1829; and the only ground upon the face of the will of Mrs. Bonsall, upon which it has been contended that the will is to be considered as an execution of the power given by the will of Martha Davies is, that she thereby gives "a plain gold watch, which belonged to my sister," and to another legatee her piano-forte and music-books, coupled with a gift of all her furniture, clocks, watches, books, &c., the Master having reported that she had no other piano-forte or music-books except what had belonged to Martha Davies. Now, it is to be observed, that over such articles she, properly speaking, never had any power. She was not tenant for life of these particular articles *with a power of disposing of them by will, but of the residue of the estate of which these originally formed a part. Under what circumstances she had been permitted to retain possession of them, or whether they had in part become hers, as might have been the case, does not appear. The mere fact of their having belonged to her sister does not prove that they were not hers in 1829, as the will asserts that they were. It is, therefore, not proved that she, by her will, professed to dispose of that which she could only dispose of under a power, and must, therefore, be presumed to intend to execute it, which is the principle of the cases in which it has been decided that a general gift of the subject of a power, without reference to the power, will operate as an execution of it.

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But suppose it proved that she had no estate or interest in the watch, piano-forte, or music-books, and no right, therefore, to dispose of them, except under the power in Martha Davies's will, does it follow that the will is therefore to operate as an execution of the power over all the property to which it applies? The rule is, that for a general gift to operate as an execution of the power, it must refer either to the power or to the subject of it; but will referring to part of a subject, or to some of many subjects, be sufficient to make the will operate as an execution of the power as to such parts, or such subjects as are not referred to? The reverse was held in *Lewis v. Lewellyn* (1), in which a testator

(1) 23 R. R. 201 (T. & R. 104).

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had freehold and copyhold estates, subject to a power, and he had freehold estates of his own, but not copyhold, and he devised all his freehold and copyhold estates; and the devise was held to operate as an execution of the power as to the copyholds, but not as to *the freeholds, because he had freeholds of his own to which the terms of the devise were properly applied. So here, Mrs. Bonsall had property to which the language of her will properly applied. *Napier v. Napier* (1) proceeded upon the same principle as *Lewis v. Lewellyn*. *Walker v. Mackie* (2) does not appear to me to be reconcilable with other cases, particularly that of *Webb v. Honnor* (3). The result, therefore, is that I feel myself compelled to come to the conclusion that the will of Mrs. Bonsall did not operate as an execution of the power of appointment given by the will of Martha Davies, and that the decree, therefore, must be

Reversed.

* * * *

1834.

Feb. 20, 21.

LEACH, M.R.

On Appeal.

Nov. 18, 20,
21.Lord
BROUGHAM,
L.C.

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KENNEDY v. GREEN (4).

(3 Myl. & Keen, 699—724.)

Where one solicitor is employed in a mortgage transaction, he is to be considered as solicitor both for mortgagee and mortgagor, and notice to such solicitor is notice to the mortgagee; and where the solicitor was himself the author of a fraud which affected the title, and the fraud was committed under circumstances, apparent upon the face of the deed fraudulently obtained, which would have excited the suspicion of a professional man, and have led to inquiry, it was held at the Rolls, first, that the mortgagee was as fully affected with notice of the actual fraud, as if the fraud had been committed by a third person, and the knowledge of it acquired by the solicitor. Secondly, that the circumstances under which the fraud was committed, were sufficient to fix the mortgagee with constructive notice, and that if, in any mortgage or other transaction, a party does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation with respect

(1) 27 R. R. 144 (1 Sim. 28).

(2) 4 Russ. 76.

(3) 21 R. R. 180 (1 Jac. & W. 352).

(4) The law as to constructive notice and imputed notice (i.e. notice to an agent) is now controlled by s. 3 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39). The principle of *Kennedy v. Green* (which apparently

remains untouched by the Act) has been frequently recognized in later cases. See *Rolland v. Hart* (1871) L. R. 6 Ch. 678, 40 L. J. Ch. 701, 25 L. T. 191; *Bradley v. Riches* (1878) 9 Ch. D. 189, 47 L. J. Ch. 811, 38 L. T. 810; *Kettlewell v. Watson* (1882) 21 Ch. D. 685, 51 L. J. Ch. 281, 46 L. T. 83. —O. A. S.

to constructive notice as he would have been if he had employed a solicitor.

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The decision was affirmed, upon appeal, on the second ground, the LORD CHANCELLOR being of opinion that the mortgagee was not fixed with actual notice of the fraud, which, though known of course to his solicitor who was the perpetrator of the fraud, it was equally certain that the solicitor would conceal.

THE bill was filed by Hester Kennedy, widow, against George Green and John Bethell, the assignees of James Bethune Bostock, and against Robert Kirby; and it prayed that a deed of assignment alleged to have been executed by the plaintiff in favour of James B. Bostock might be declared fraudulent and void, and that the premises comprised therein might be re-assigned to her; and, in case it should appear to the Court that the defendant Kirby was entitled to priority over the plaintiff in respect of any assignment made to him of the said premises by James B. Bostock, that the plaintiff might be declared entitled to redeem the same.

The facts stated by the bill and proved by the evidence were, that in the year 1824, James Bethune Bostock was employed by the plaintiff, who resided at Ipswich, as her solicitor, to sell out a sum of 9,000*l.* 3 per cent. Bank Consolidated Annuities, then standing in her name, and to look out for mortgage securities on which she might invest monies to the amount of 9,000*l.* sterling. Bostock did, accordingly, sell out the stock, *which produced the sum of 8,414*l.* 1*s.*, and he received from the plaintiff the further sum of 585*l.* 19*s.*, making together the sum of 9,000*l.* sterling, which was to be invested on mortgage. Bostock was the original lessee of certain pieces of ground situate near Kennington Common, of which, on the 15th of January, 1825, he had granted two building under-leases for terms of seventy-nine years and a half, wanting ten days, respectively, one at the rent of 31*l.* per annum to Joseph White, and the other at the rent of 25*l.* per annum to Thomas Kitson, who afterwards assigned his interest in the same to White. In the same month of January, 1825, Bostock, on behalf of the plaintiff, agreed to advance to White the sum of 3,000*l.* on the security of these two leases; and by an indenture, dated the 21st of January in that year, between White of the one part,

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and the plaintiff Hester Kennedy of the other part, reciting the leases made by Bostock to White and Kitson respectively, and the assignment of Kitson's lease to White, it was witnessed, that in consideration of the sum of 3,000*l.* therein expressed to be advanced to White by the plaintiff, White assigned to the plaintiff, her executors, administrators, and assigns, the respective pieces or parcels of ground, messuages, and premises comprised in the two indentures of lease, subject to redemption on repayment of the 3,000*l.*, with interest for the same at 5 per cent.

In the month of March, 1825, Bostock wrote a letter to the plaintiff, stating that a mortgage for the sum of 3,000*l.* had been completed; and in the month of April following he wrote another letter to the plaintiff, purporting to contain an account of the application of the whole sum of 9,000*l.*, and stating that the additional income arising from the investment would be upwards of 160*l.* per annum more than she had previously received; that the securities were most ample, and that *the strictest punctuality would be observed in the payment of the interest.

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The plaintiff received from Bostock the interest upon the sum advanced to White, and upon the other sums alleged to be invested on mortgage, until the month of March, 1828.

In that month Bostock wrote a letter to the plaintiff, in which he stated that he should in a few days be near Ipswich, the place of her residence, and that he would take the opportunity of paying her a visit. Bostock, shortly afterwards, arrived at the house of the plaintiff; and after partaking of breakfast with the plaintiff and some friends who were staying at her house, he stated that he had some business to transact with the plaintiff; and, after mentioning that one of the mortgagors to whom part of the plaintiff's money had been advanced was rather irregular in paying his interest, he produced a parchment writing, which he said it was necessary for the plaintiff to sign in order to make the principal and interest in such mortgage more secure, and to compel the mortgagor, under a heavy penalty, to be punctual in the payment of the interest as it became due. The plaintiff, without reading or examining the instrument presented to her, signed her name in compliance

with Bostock's request, in the places pointed out by Bostock; and Captain James M'Farland and his wife, who were the friends of the plaintiff staying with her in her house, also wrote their names, as attesting witnesses, in the parts of the instrument pointed out by Bostock.

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The instrument, to which the execution of the plaintiff was thus obtained, purported to be a deed of assignment, dated the 26th of March, 1828, whereby, after *reciting the indentures of lease by Bostock to White and Kitson, and the assignment by Kitson to White, and the assignment by way of mortgage of the 21st of January, 1825, by White to the plaintiff, and further reciting that Bostock was about to become the purchaser of the premises comprised in the mortgage to the plaintiff, and that there was then due and owing to her for principal and interest the sum of 3,046*l.* 17*s.*, and that Bostock was desirous of purchasing the mortgage, it was witnessed that, in consideration of the sum of 3,046*l.* 17*s.* therein expressed to be paid to the plaintiff by Bostock, the plaintiff assigned the mortgaged premises, and all the estate, right, title, and term of years of her, the plaintiff, in the said mortgaged premises to Bostock, his executors, administrators, and assigns, to hold the same for the residue of the terms of years granted by the indentures of lease respectively. And on the back of the instrument was indorsed a receipt, to which were annexed the signature of the plaintiff and the attestation of Captain M'Farland and his wife, purporting to be an acknowledgment by the plaintiff of her having received from Bostock the sum of 3,046*l.* 17*s.* The receipt for the consideration money was not, as usual, written by the stationer, but by Bostock; nor was it in the usual place, which is at the upper extremity of the left-hand square formed by the fold of the deed, but much lower down, so that there was a space reserved for writing the receipt, if it were not written before the plaintiff signed her name; or if written before the plaintiff wrote her name in that part of the parchment, the deed might have been presented to her in a folded form, so that she would not have observed the receipt.

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In the month of February, 1827, a commission of bankrupt was issued against White, the sub-lessee and *mortgagor; and

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Bostock afterwards contracted with the assignees, appointed under White's commission, for the purchase of the bankrupt's equity of redemption, and that equity of redemption was conveyed to Bostock by a deed, dated the 18th of April, 1828, which contained a recital that the plaintiff's mortgage had been paid off by Bostock, and that she had by an indenture, dated the 26th of March, 1828, in consideration of the principal and interest then due to her having been paid by Bostock, assigned the premises to Bostock for the residue of the term granted by the two indentures of lease therein recited.

Some time afterwards Bostock applied to the defendant Joseph Kirby, who was his father-in-law, to advance to him the sum of 2,000*l.* on the security of the leasehold premises; and by an indenture, dated the 7th of August, 1829, and made between Bostock of the one part, and the defendant Joseph Kirby of the other part, after reciting the lease by Bostock to White, and the lease by Bostock to Kitson, and further reciting that by divers acts and assurances in the law Bostock had become and then was absolutely entitled to all the residue of the several terms granted by the said therein recited indentures of lease, and that the defendant Kirby had agreed to advance to Bostock the sum of 2,000*l.* on the terms and security thereafter expressed, it was witnessed that, in consideration of 2,000*l.* paid to Bostock by the defendant Kirby, Bostock assigned to the defendant Kirby, his executors, administrators, and assigns, all the premises comprised in the said recited indentures of lease, and all the estate, term, &c. of Bostock in the same, to hold the same to the defendant Kirby, his executors, &c. for the residue of the unexpired terms, upon trust to secure to the defendant Kirby, his executors, &c. the payment by Bostock, his heirs, executors, &c. of the 2,000*l.* and interest at 5 per cent. And the deed gave a power of sale to the defendant Kirby, his executors, &c. in case of default in payment of the principal sum at the time appointed for the payment of the same, and also a power to raise any sum by mortgage, and afterwards to sell the leasehold premises, if Kirby, his executors, &c. should think fit.

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In the month of June, 1831, default having been made in

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payment to the plaintiff of the interest of the 3,000*l.* advanced to White, the plaintiff called upon Bostock to send to her the title-deeds relating to White's mortgage, and to procure the repayment of the mortgage-money. Bostock sent a letter in answer to the plaintiff, stating that the arrear of interest would be shortly paid, and that the title-deeds would be sent to her as soon as a transfer of the mortgage was effected.

On the 9th of June, 1831, a fiat in bankruptcy was issued against Bostock, to which he did not surrender, having in fact absconded; and he was duly declared a bankrupt, and the defendants Green and Bethell were appointed his assignees.

The bill was filed on the 10th of July, 1832: it charged that no debt was really due from Bostock to the defendant Kirby, his father-in-law, but that the assignment to Kirby was executed fraudulently, and with a view to defeat the claim of the plaintiff; and that, at the time when such assignment was executed, Kirby or his solicitor had notice of the previous assignment of the mortgaged premises to the plaintiff, and knew that the sum of 3,000*l.* and interest was still due to the plaintiff.

The defendant Kirby, by his answer, stated that Bostock, when he applied to him for the loan of 2,000*l.* upon the security of the leasehold premises in question, *delivered over to him the title-deeds relating thereto; and that he, the defendant, felt himself competent from his own knowledge and experience in such transactions to examine the same and make himself master of the title without any professional assistance; and that, if he had found any thing which he could not comprehend, he should have applied to Mr. Kearsey, whom he considered as his solicitor, and whom he had employed before he became acquainted with his son-in-law Bostock; that he, the defendant, had been in possession of the title-deeds from August, 1829, until May, 1832, without any claim being made on the part of the plaintiff, and without any suspicion of the plaintiff or any other person having any claim in opposition to his rights. The defendant denied that he had employed Bostock as his solicitor; and he stated that, on default of payment by Bostock of the sum of 2,000*l.* at the time appointed in the indenture of the 7th of August, 1829, he had caused notice to

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be served upon Bostock, previous to the filing of the plaintiff's bill, requiring him to pay the principal money and interest due on the defendant's security, or that he, the defendant, should proceed to a sale; but that no sale had been made, or was intended to be made; and the defendant insisted that he was entitled to hold the premises comprised in his mortgage, as a security for the repayment of the principal sum and interest due, in priority to the plaintiff. The defendant did not know whether Bostock was ever let into possession of the premises in question, or into the receipt of the rents and profits thereof, but was informed by Bostock that he was in possession. The defendant denied all knowledge of or participation in the fraud alleged to have been committed by Bostock, and he insisted that the receipt on the back of the deed was in the usual form; and he stated that he believed that the whole width of the upper part of the deed, comprising the first *and second folds, was exposed to the view of the plaintiff and witnesses at the time the receipt was signed and attested, inasmuch as parts of letters composing the words written by the plaintiff and the witnesses were in the upper division of the parchment made by the fold, and other parts of the same letters in the lower division.

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It appeared by the evidence of the law-stationer, by whose assistant the indenture of the 26th of March, 1828, was engrossed, that it is the usual practice for law-stationers to indorse receipts for the consideration money expressed in the deed at the upper part of the left-hand corner of the back of the engrossment, unless instructions were given to the contrary; and that this indorsement was not made on the deed in question before it was returned to the person for whom it was engrossed. Several experienced solicitors were examined, who deposed that the unusual circumstances attending the receipt, and the form of the deed itself, would have so much excited their suspicion, that they would not have suffered any client of theirs to become a mortgagee under Bostock without further inquiry. The deed purported to be an assignment of a mortgage, and bore only a common deed stamp; but, instead of assigning the mortgage-debt, it assigned the premises charged with the debt; and it did not assign the mortgage deed, or contain the

usual powers to the assignee to recover and receive the debt. It, moreover, recited that Bostock had agreed to purchase the mortgaged premises of Mrs. Kennedy; and if it had been really a purchase either of the mortgage debt, or of the mortgaged premises, it would have required an *ad valorem* stamp.

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The questions raised in the cause were, first, whether, supposing the legal estate of the mortgaged premises to be vested in the defendant Kirby, Bostock was to be *considered as the solicitor of Kirby, and Kirby, therefore, affected with actual notice of the fraud committed upon the plaintiff; secondly, whether, if Kirby had not actual notice, the unusual circumstances attending the receipt, and the unusual and irregular contents of the deed, did not amount to implied notice of the fraud.

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Mr. Pemberton and Mr. Girdlestone, jun., for the plaintiff :

* * The circumstances of this transaction are abundantly sufficient to fix Kirby with implied notice of the fraud. * * Not only was the fact of Bostock being out of possession a circumstance which Kirby was bound to ascertain, and which, *when ascertained, was sufficient of itself to put him upon further inquiry; but the unusual circumstances connected with the receipt, the contents of the deed itself, and the absence of a proper stamp, were calculated to excite suspicion, and would, as it is sworn by several unexceptionable witnesses, have excited suspicion in the minds of any persons of competent professional skill, and have induced them to decline treating with Bostock, on behalf of any client, until further inquiry had been made.

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* * Either Bostock was his solicitor, and he is, so far as actual notice of the fraud is concerned, legally identified with Bostock; or he had no solicitor, and if he thought proper to act for himself without resorting to professional aid, the consequences of his negligence, or of his confidence in his own skill, which in its foundation and in its result was equivalent to negligence, are not to be visited upon an innocent third party. If the effect of the mesne assignments, one of which was effected by an act of gross fraud, was to vest the legal estate in Kirby, then Kirby held that legal estate subject to the equity of the plaintiff to be relieved against the fraud.

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(THE MASTER OF THE ROLLS: I am of opinion that the effect of these transactions was to vest the legal estate in the defendant Kirby. Bostock, the original lessee, made two under-leases, the interest in which afterwards became vested in White; White assigned his interest in the terms by way of mortgage to the plaintiff, *who thus acquired the legal estate, which she afterwards assigned to Bostock. The assignees of White assigned the equity of redemption to Bostock, the original lessee; and there was thus a surrender and merger of the sub-leases, and Bostock acquired a complete title at law. I am of opinion that the deed under which Kirby claims was not an assignment of the two terms vested in the plaintiff by White's mortgage, but that it created a new mortgage.)

Mr. Bickersteth, Mr. Wigram, and Mr. Hughes, contra :

It cannot be disputed that a gross fraud has been committed ; and the question is, upon which of two parties who, in a moral sense, are entirely innocent, the consequences of that fraud shall be visited. On the part of the defendant, the transaction between him and Bostock was a fair and *bonâ fide* transaction ; and it is to be borne in mind, that whatever the consequences of the fraud may be, and on whomsoever they are to light, those consequences are the result of the act of the plaintiff. Had it not been for her misplaced confidence in Bostock, the 2,000*l.* would never have been advanced by Kirby. She was in possession of a good and valid security ; and it was to render her situation, as she conceived, more secure, that she was induced to do the act which enabled Bostock to perpetrate the fraud. Previously to the execution of the assignment to Bostock by the plaintiff, Bostock had entered into a contract to purchase the equity of redemption from White's assignees. Bostock was also a mortgagee of the leasehold premises, and the terms of his contract with the assignees were to pay off the plaintiff's mortgage, apply part of the purchase-money to the satisfaction of his own mortgage, and stand as a creditor to White's estate for the surplus. * * It is not pretended that Kirby had any direct knowledge of the fraud ; and the only question is, whether he had a knowledge of such circumstances as ought to have put

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him upon inquiry, and might, if he had followed out the inquiry, have led to a discovery of the fraud. It is said that the receipt is in an unusual place, and that a space was fraudulently reserved on which the receipt was written, after the plaintiff and the witnesses signed their names; but it appears that their names are so written on the crease formed by the fold of the parchment, that the upper part of the parchment must necessarily have been exposed to the view of the persons who wrote the signatures. None of the alleged irregularities in the form of the deed are of a nature that would have excited suspicion, had it not been for the circumstances which have naturally led the witnesses to scan every part of this deed with extraordinary vigilance. * * As to the argument that Kirby is to be fixed with actual notice of the fraud, because notice to the solicitor is notice to the client, *that rule applies only to the same transaction in which the solicitor and client were engaged, and not to prior transactions in which the solicitor was engaged: for, if it were otherwise, no one could, without risk, employ an eminent professional adviser, and the greater the eminence of that adviser, and the more extensive his practice, the greater would be the danger of the party employing him.

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Mr. Bethell, for the assignees.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS:

By this bill Mrs. Kennedy complains that, by her great confidence in Bostock, and by the gross abuse of that confidence on his part, she was induced to assign to him, not her actual right and interest in the mortgage, but her legal or apparent title. This legal and apparent title Bostock afterwards assigned by way of mortgage to the defendant Kirby; and the bill asserts that Mr. Kirby, at the time he took this legal or apparent title, contrary to the actual right and interest of Mrs. Kennedy, had either actual notice of the fraud committed by Bostock, or, if not actual notice of the fraud, had notice of circumstances which imposed upon him the necessity of inquiry, which, with due care and diligence, would have led to a full knowledge of the

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fraud ; and the question before the Court is, whether the assertions thus made in the bill have or have not been established in the progress of the cause ; and I am of opinion that they have been completely established.

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Upon the question of actual notice, it must be admitted that notice to the agent or solicitor is notice to the principal. In all mortgage transactions, the solicitor *of the mortgagee is the person employed in the preparation of the security ; and it is fit that it should be so, because it is his money that is advanced, and it is his interest that is to be protected. The mortgagee here was the father-in-law of the mortgagor, and being the father-in-law of the mortgagor, he employs no other solicitor than his son-in-law Bostock, who was himself a solicitor. Having, in the common course of business, been in the habit of employing a different solicitor, in this transaction he intrusts Bostock as his sole solicitor, and Bostock must be considered as the solicitor of the mortgagee, as well as acting for himself the mortgagor. If Bostock is to be considered as the solicitor of the mortgagee, it is impossible to deny notice. It is said, that this is a case similar to those in which the Court has declared that a client is not to be affected by notice of a solicitor in a prior transaction. This case has no analogy to that principle. Bostock is here to be considered as if, in this transaction, notice had been given to him by a third person of the fraud committed upon Mrs. Kennedy. If Bostock, acting both for the mortgagee and mortgagor, had received notice of a fraud thus committed upon Mrs. Kennedy by a third person, it would plainly have been notice to Kirby ; and Bostock being in full possession of knowledge of the fraud, because he was himself the author of it, Kirby is as much affected by his solicitor's knowledge of the fraud as if the solicitor had acquired that knowledge from a third person. Upon that ground alone, if there were no other, I should consider the defendant Kirby as affected with full notice of the actual fraud.

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There is, however, another ground. I have stated that the question is, not only whether there is actual notice, but whether there is a knowledge of those circumstances, which, if reasonable diligence had been *used, would have led to a knowledge of the

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fraud. I am of opinion, here, that the defendant Kirby is fixed with notice of those circumstances which would have led to a knowledge of the fraud. It is said that Kirby employed no solicitor, and that he, therefore, is not to be fixed with those circumstances apparent upon the deeds, which would have led other persons to indulge suspicion. Such a proposition is not to be entertained in any court of justice. A man is not to avoid the consequences of a want of due diligence, by stating that he has neglected those means, which would have been required, if he had used reasonable caution. If the defendant Kirby, not considering Bostock as his solicitor, had employed another solicitor, he would have been fixed with implied notice from the circumstances arising from the deeds in question; and he cannot protect himself from such implied notice, by not having used the ordinary caution of employing a solicitor to protect his interest. The perusal of the deeds would have led every man of business to the conclusion that there was something irregular; and the nature of this transaction would, therefore, have induced an inquiry, which, if pursued with reasonable diligence, would have led, by reference to Mrs. Kennedy the plaintiff, to a full knowledge of the circumstances under which she had been induced to assign her interest to Bostock.

The defendant, Kirby, must therefore assign his mortgage to the plaintiff Mrs. Kennedy, and must pay the costs of the suit.

The cause was reheard before the Lord Chancellor. The arguments at the rehearing were similar to those urged at the hearing in the Court below.

Nov. 18, 20.

The *Solicitor-General*, *Sir William Horne*, and *Mr. Girdlestone*, jun., in support of the decree.

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Sir Edward Sugden, *Mr. Wigram*, and *Mr. Hughes*, *contra*.

Mr. Bethell, for the assignees of Bostock.

THE LORD CHANCELLOR :

Nov. 21.

This case, from the peculiar circumstances of fraud which belong to it, and from the hardship in which the Court is placed of throwing the consequences of the injury worked by the guilt

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of the wrongdoer upon one of two equally innocent persons, has naturally excited considerable interest both below and here. Much has been said of the late MASTER OF THE ROLLS's habitual dislike of fraudulent transactions, a feeling which I hope and trust his Honour shared with all other Judges, as he certainly did with all good and honourable men. But it seems to be supposed that he carried this feeling so far as to let it affect his judgment, and make him draw false conclusions from facts—nay, for, unless this further step is made, it explains nothing here—that his indignation against wrongdoers caused him to conceive like feelings against the innocent, and in search of a victim, because a wrong had been done, involve the blameless with the guilty, and even punish the victims for the injury which had been done by the wicked against themselves. In such feelings I hope and trust no Judge ever does indulge. I am confident the late MASTER OF THE ROLLS did not. I know that, were I to bring such to the decision of this case, I should be working the grossest and most unpardonable injustice. Mrs. Kennedy is innocent ; Mr. Kirby is innocent ; both are dupes and *victims ; the connexion by marriage between the latter and the wrongdoer is only an additional misfortune, and surely no fault ; and the only question is, which of the two in this Court, and as far as equitable relief extends, shall suffer the consequences of the crime. If either has been guilty of negligence, that, though blameless, must be recorded against them and affect their claims ; and that must be taken into account with all the rest of the facts in the case.

These are few and simple, nor are they at all in dispute between the parties.

James Bethune Bostock was the solicitor of the plaintiff, Mrs. Hester Kennedy, an elderly lady, but in the full enjoyment of her faculties : and he was employed by her with a more than ordinary share of confidence reposed in him. This he grossly abused. Finding it necessary, for the purpose of enabling him to obtain money from Mr. Kirby, the defendant, his father-in-law, to get from her an assignment of a mortgage for above 3,000*l.*, he caused a deed to be prepared, and employed a stationer, to whom he was apparently unknown, for he paid ready money for the engrossment, and received it back without

the title of the instrument indorsed on the usual place, and in the accustomed engrossing hand. He then carried it to his client, and obtained her signature and seal and execution on the face of the deed, at the foot, in the ordinary way. Captain and Mrs. M'Farland subscribed on the back the usual attestations as witnesses; and there appears further on the back a very extraordinary receipt for the whole money, signed also by Hester Kennedy, and witnessed by the M'Farlands.

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In all deeds the receipt is put on the upper of the squares, formed by folding the parchment; or, if the deed is executed before the folding, it is still at the top, in order to prevent any fraudulent addition being made after the party shall have signed the receipt. But here the receipt is written not only far down the skin; it is written at the very bottom of the upper left hand square, so that there might have been any thing prefixed, and then the word "further" added to connect it with what follows, and what is signed.

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Again, the name is always signed immediately after the receipt, and on the same square, and above the fold. But here, for the first time, we see the receipt on one square and the name on the one below, so that no one can look at the instrument without perceiving that the party might have signed it when folded up, and when no part of the receipt had been written on the skin. I pass over the other lesser singularities of part of the receipt, and part of the name being written laterally on one square and part of each on another.

Now it is said that all this is not evidence sufficient to convict Bostock of fraud, and that it does not raise more than a suspicion; that it is only consistent with the supposition of fraud, but that it does not prove in what manner Mrs. Kennedy's signature was obtained. For all that the subscribing witnesses swear is, that they have no knowledge or recollection of any receipt or any thing being written above the place where Mrs. Kennedy and themselves signed what is now the receipt. To one very material circumstance, however, they both distinctly swear; that no money passed, and that nothing whatever was said about any money or receipt of any thing on the occasion. This is carefully to be kept in view.

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But we are now to look at what afterwards happened, and that leaves no doubt at all upon the transaction. Bostock took the deed away with him, and retained it in his possession until he handed it over to Mr. Kirby, when he applied to Mr. Kirby for the loan of 2,000*l.* upon the security of the leasehold property.

That Bostock was employed in this transaction by Mr. Kirby as his solicitor, and in his professional capacity, no one can affect to doubt. Mr. Kirby was in trade, and did not trust his own ignorance of law writings and inexperience in conveyancing. Bostock was acting therefore as his professional man; his agent to do, and his adviser to counsel. He then obtains the 2,000*l.* from Mr. Kirby on the assignment of the mortgage, and not a farthing of this does he pay over to his other client, Mrs. Kennedy, whose receipt he had obtained. He employs it in his own speculations, or to supply other of his necessities; and his practices being discovered—his conduct brought before the Court of King's Bench—his affairs plunged into confusion and bankruptcy—he did not meet the charges, nor face his creditors, but absconded and went abroad.

This throws a broad and clear light upon all the story, which the inspection of the deed tells, making quite plain with what view and in what way the signature of Mrs. Kennedy was gotten, and shewing as clearly that he made her sign the receipt without seeing what she was setting her hand to, by a statement that she was only completing her execution of the mortgage deed itself, or doing an act by which she would secure the regular payment of the interest upon her mortgage-money. To say that the deed only raises suspicion after this, is wholly impossible.

[*718] The after acting clears *all doubt away, and we see the whole transaction in its proper and its hideous colours.

How much worse than ordinary breaches of trust, committed under the pressure of embarrassment, this conduct of Bostock's was, need not be noted in passing. The man of business who diverts to his own use his client's money intrusted to his hands, and while his client employs him in some sort as a banker, is far from blameless, though that peculiar kind of employment, and the nature of that deposit, and the pressure of his unforeseen necessities may greatly extenuate his fault. But here was

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a person who actively contrived a fraud to delude both his employers; took advantage of one of those clients to obtain an instrument by getting a signature to one thing, whilst he made the party suppose she was signing another; imposed on his other client and relative by giving him for a large sum an instrument at law not worth a farthing, if the truth came out, and then applied the money so obtained to his own uses—conduct approaching in a moral view, nearer than by any assignable distance, to forgery.

But the degree of Bostock's guilt or the complexion of his fraud—be it more aggravated, be it less—is immaterial to the decision of the present question. That there was fraud is abundantly clear; such fraud as, if proved to a Court and jury, would have rebutted all claims at law upon this instrument, and sustained the plea of *non est factum* by Mrs. Kennedy pleaded in bar. I have no kind of doubt that such would be the case, and this the result of an action or of an issue, which I therefore hold it superfluous to direct.

But has not Mrs. Kennedy also a right to the equitable relief of this Court? That depends upon a defence *competent to Mr. Kirby here, though immaterial elsewhere. He says he was a purchaser for value, and without notice; and the question thus raised is, had he notice or not? Of actual knowledge there is no question. No evidence touches Mr. Kirby, nor is he charged in any way with knowing or partaking in the fraud of Bostock. But it is said that neither had he any constructive notice.

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The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge.

In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were

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the law not to consider the knowledge of one as common to both, whether it be so in fact or not. Under one or other of these heads, perhaps under both, comes the other principle, which is quite undeniable, that whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is also notice of every thing to which it is afterwards found that such inquiry might have led, although all was unknown for want of the investigation.

These principles are so plain that they need not be supported by reference to authority, and they dispose of the present question.

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Bostock was acting as Mr. Kirby's solicitor in the transaction, and although, generally speaking, the knowledge obtained by a man's attorney or agent fixes himself, if obtained while so employed, and on the same business (for I do not at all differ from *Mountford v. Scott* (1), *Hiern v. Mill* (2), and the other cases), yet it cannot here be said that Mr. Kirby is fixed with all which Bostock knew. For the fraud, practised by Bostock upon Mr. Kirby himself, was of course concealed from him; and so we may say would certainly be that other fraud which he had practised on Mrs. Kennedy. Indeed that was only another part of the same fraud, another act of the same plot; and, therefore, I think we cannot, on this account alone, fix his client Mr. Kirby any more than his other employer Mrs. Kennedy, with the knowledge of his criminal proceedings. We must lay out of our view all the knowledge, the actual and full knowledge he had of his own fraud, and are not to hold Mr. Kirby as cognisant—I mean of course cognisant in law and constructively—of that, merely because his solicitor himself, the contriver, the actor, and the gainer of the transaction, knew it all well.

But suppose him not the actor, and only regard him as an attorney wholly unconcerned in the plot, and employed by Mr. Kirby, and not only innocent of the whole affair, but wholly ignorant of it. This supposition is as strong as we can make in Mr. Kirby's favour, gets rid of all the last argument I have adverted to, and meets the objection that the plotter of the fraud never could communicate it to one of its victims; and that to charge the latter with his guilty knowledge would be unjust.

(1) 18 R. R. 189 (3 Madd. 34).

(2) 9 R. R. 149 (13 Ves. 114).

I say still, with all this deduction and all this supposition, Mr. Kirby is fixed. For Bostock, had he been wholly free from the guilty knowledge, and only *employed as a solicitor to act for and advise Mr. Kirby must, on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed. The contents of the instrument itself were perhaps calculated to rouse suspicion, and prompt inquiry. But the back of the deed was checkered all over with suspicious appearances. The title of the deed, not in the engrossing hand, but written in a somewhat slovenly way, and with the words of the title of different sizes, beget a suspicion of hurry and imperfection in the preparation of the instrument. When does a stationer ever send such a blank indenture out of his office, unless when pressed for singular dispatch? Then the receipt written across one fold into a second square sideways, and the signature in like manner running into the second square. But, above all, the receipt removed far from the top, and leaving such a space as might by the holder of the deed, supposing that space to have been left in blank, have been filled up in any manner he chose. This was, at once, the circumstance to excite the greatest, the most jealous suspicion. Had a cheque been originally written with an inch of blank to the left hand of the sum, would not all who saw it start at the risk run by the maker, and would not the maker, on his attention being drawn to it, nay, even the holder, take the precaution of drawing a line or two over the blank? But suppose a banker had discounted a cheque with a sum as "one hundred" interlined, would any Judge direct any jury to let that banker recover against the maker, though full value had by him the banker been paid for it? All the cases have decided the contrary, and held that every unusual circumstance is a ground of suspicion, and prescribes inquiry; and I hold the receipt written here in a way to enable any person to commit a gross fraud—a way for that reason never adopted—was abundant ground for *suspicion, and demanded inquiry and explanation. When to this we add the further unusual circumstance of the party's name being written on the square below, and with a fold between it and the receipt, so that it was most probably written when the receipt was folded

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down, assuredly no one can hesitate in pronouncing that whoever, especially a man of business, looked at the deed, must have conceived such suspicions as to call for inquiry; and if he had inquired, Mrs. Kennedy would have told him that she knew of no receipt, and had received no money, and that the whole, consequently, was a fraud. Thus, taking Bostock to be merely an ordinary solicitor, employed by Mr. Kirby in settling this transaction for him, the deed was such as at once gave him notice that all was not right, and put him upon inquiring. That is notice to him and his employer of whatever the inquiry would have disclosed. Can it make the least difference, that in this case Bostock abstained from making the inquiry, because he already knew the whole fraud, the tissue of which his own hands had woven? Can it alter the fact, or displace the point, on which the whole turns, of the existence of suspicious appearances, and the certainty that the inquiry, instigated by them, must have disclosed the truth, that this truth was already within the full knowledge of the person employed, and whom we are supposing to have examined the deed for his client? A difference it may make, but the difference is against, and not in favour, of the defendant's argument.

Can it, again, make any difference in the case we are supposing of a solicitor employed to examine a deed, and having ground to suspect, and, suspecting, being bound to inquire as to its fraudulent concoction, that here, besides being so employed, he was himself the fabricator of the whole fraud, and only did not suspect, *because he knew for certain the whole plot? A difference it may make, but that difference is against, and not in favour, of the defendant's argument.

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I therefore consider the case of constructive notice as here abundantly made out, and I affirm the decree of the MASTER OF THE ROLLS; but I think, as the plaintiff resorts to this Court for relief against her own handwriting, we must recollect that she, by simply looking at the parchment which she signed without seeing what it contained, might possibly have discomfited the wicked man who was engaged in circumventing her; and I do not, therefore, think she ought to have had her costs below against the other party, to whom no *laches* at all is imputable personally, who also

is the defendant, and does not come to ask any thing of the Court. The decree must therefore be affirmed with this alteration as to the costs, and, for the same reason, I do not give her the costs of the appeal. The deposit must be returned.

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GREEN.

* * * * *

TAYLOR v. DAVIS(1).

(4 L. J. (N. S.) Ch. 18—20; S. C. 3 Beav. 388, n.; further proceedings, 7 L. J. (N. S.) Ch. 179.)

1834.
Nov. 24.
—
LEACH, M.R.
[18]

Partnership—Injunction.

Where one partner abstracted a partnership book from the counting-house of the firm, contrary to an express covenant, the Court restrained him by injunction from continuing to violate the covenant.

By the bill, the material allegations of which were verified by affidavit, it appeared that on the 16th of December, 1824, the plaintiff and defendant entered into partnership as stock-brokers; and that, by the partnership deed, it was, amongst other things, agreed, that proper books should be kept, and the partnership transactions entered therein, &c.; and "that all books of account, documents, papers, letters, and writings, of or relating to the said co-partnership, should be kept and continued in the accounting-house of the co-partnership firm, or in such other place as should from time to time be mutually agreed on between the said parties; and that each of the said parties should at all times have reasonable access to examine, cast up, and copy out of the same, without any hindrance or denial of the other of them;"—that, on the 3rd of October, 1834, the partnership then being about to expire, the defendant, without the sanction or concurrence of the plaintiff, had carried away from the counting-house of the firm, an important partnership book, called "the Alphabet," which he still retained in his custody, and he refused to return the same until compelled, notwithstanding several applications had been made to him by the plaintiff and his solicitor for its return. It also appeared that a copy of that book was indispensable to enable the plaintiff to carry on the business on his separate account after the expiration of the

(1) See now the Partnership Act, 1890, s. 24(9); and *Greatrex v. Greatrex* (1847) 1 De G. & Sm. 692.

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v.
DAVIS.
[*19]

partnership; and that the defendant had stated to one of the clerks of the firm, "that he need *not be surprised if he found the books burned." The bill prayed, "that the defendant might be restrained by injunction from keeping the said book any longer in his exclusive possession, away from the counting-house of the said firm, or in any such manner as to exclude or impede the plaintiff from or in the use thereof, at all convenient times, for the purposes of the said business, or in any other manner warranted by the said articles of agreement; and from removing the same after it should have been restored to the counting-house of the said firm, without the concurrence of the plaintiff; and from removing any other partnership books, documents, or papers, from the said counting-house, without the plaintiff's concurrence." The bill also prayed, "that he might be restrained from withdrawing the cash balances and securities from the bankers."

Mr. Pemberton and *Mr. Wilcock*, for the plaintiff, now moved for a special injunction, in the terms of the prayer of the bill, contending, that, there being a clear infraction of the agreements, and an exclusion of the plaintiff from his just right, he was entitled to the interference of the Court; and, as there were grounds to apprehend that the books would be injured, that the Court would interfere to prevent an irreparable injury.

Mr. Bickersteth and *Mr. Richards*, for the defendant, in opposition to the application.

[Their arguments and the cases cited by them sufficiently appear in the following judgment:]

Nov. 24.
—

THE MASTER OF THE ROLLS, [after stating the terms of the motion and the covenant in the partnership deed on which it was founded, proceeded:]

On the facts of this case there is no difficulty; for there is sufficient to shew, that the defendant has violated the covenant by abstracting the book from the counting-house, and there are good grounds for believing that he has so done, in order to obtain an unfair advantage over the plaintiff. Three objections have been made to the application: first, that the whole object of the suit will be obtained by motion; *secondly, that this

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Court will grant no relief in partnership cases, unless the bill prays a dissolution; and, thirdly, that the real object of the injunction is to compel him to do an act, and not to abstain from one. I think there is no weight in the first objection, for that must be the case in all injunction cases; and where a bill prays a perpetual injunction, it is clear that the Court will, upon an interlocutory application, grant an injunction to restrain the defendant until the hearing. As to the second objection, Lord ELDON, in *Forman v. Homfray* (1), and the present VICE-CHANCELLOR, in *Loscombe v. Russell* (2), have laid it down, that no suit can be entertained for partnership accounts, unless the bill prays a dissolution; but the late MASTER OF THE ROLLS, in *Harrison v. Armitage* (3), expressly denies that principle. The present case is not, however, open to the same objection as in those cases, for here the plaintiff does not pray any account, but only seeks to restrain the defendant from acting in contravention of the covenants in the partnership deed. In *Marshall v. Colman* (4), Lord ELDON doubted whether the Court would in any case grant an injunction to restrain the breach of a covenant in articles of partnership, unless there is ground for, and the bill prays, a dissolution of the partnership. If such were the law of this Court, it might easily be evaded by praying a dissolution, without attempting afterwards to enforce it; but if this Court interferes, which it does frequently, to prevent breaches of covenant in other cases, why should it refuse its aid to partners? (5) I therefore think that the second objection is not sustainable. The only difficulty which weighs upon my mind is on the third objection, arising out of the decision in *Blakemore v. The Glamorganshire Canal Company* (6), and the similar cases cited. It must be observed, that in that case the act was completed, and the defendant had done all he intended to do; he had finished the mischief; and the injunction professedly sought to make him undo all which he had done: there, there was no continued breach of duty, but in this case there is a continued

(1) 13 R. R. 115 (2 V. & B. 329).

(2) 33 R. R. 83 (4 Sim. 8).

(3) 20 R. R. 284 (4 Madd. 143).

(4) 22 R. R. 116 (2 Jac. & W. 266).

(5) His Honour here referred to

the cases of *Morris v. Colman*, 11 R. R. 230 (18 Ves. 437), and *Clarke v. Price*, 18 R. R. 159 (2 Wils. C. C. 157).

(6) 36 R. R. 289 (1 My. & K. 154).

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violation of the contract, a daily breach of duty. I think, therefore, on the whole, that it is quite clear, that the defendant has been guilty of a violation of the partnership articles; and that, unless the plaintiff has the benefit of the covenant, and full access to the books, an irreparable injury will be effected; this Court in such a case interferes; and although I should have great difficulty in extending the jurisdiction, yet, on the whole of this case, I am of opinion that the plaintiff is entitled to an injunction; and that it should in terms follow, as nearly as possible, the words of the covenant.

Injunction granted.

1838.
Feb. 28.
—
LANGDALE,
M.R.

[The injunction was continued at the hearing, although the partnership had then become dissolved by effluxion of time: see 7 L. J. (N. S.) Ch. 179.]

1834.
Nov. 8, 10, 14.

Lord
BROUGHAM,
L.C.
[25]

CROSSLEY v. THE DERBY GAS LIGHT COMPANY.

(4 L. J. (N. S.) Ch. 25—27.)

Patent—Injunction.

Although a patent has expired, the Court may grant an injunction to restrain the sale of articles manufactured in fraud of that patent previous to its expiration.

[In this case an application was made a few days before the expiration of a patent for an injunction to restrain an infringement recently discovered. In the course of his judgment the LORD CHANCELLOR observed:]

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The point has never yet been decided; but I am of opinion that the Court would interfere, even after a patent has expired, to restrain the sale of articles manufactured previous to its expiration in infringement of a patent right; and that a party would not be allowed to prepare for the expiration of a patent by illegally manufacturing articles, and immediately after its expiration to deluge the market with the produce of his piracy; and thus reaping the reward of his improbus labour in making it. The Court would, I say, in such case restrain him from selling them even after the expiration of the patent.

[His Lordship affirmed the decree of the VICE-CHANCELLOR, who had granted the injunction and directed an account for six years back.]

PEACOCK *v.* BURT (1).

(4 L. J. (N. S.) Ch. 33—36.)

1834.

Nov. 17.

LEACH, M.R.

[33]

Mortgage—Tacking—Notice.

A second mortgagee cannot, by giving notice to the first, prevent a third mortgagee from obtaining a priority over his security, if the latter advance his money without notice of the second mortgage, and afterwards obtain the legal estate by buying up the first mortgage.

The third mortgagee, being a purchaser for valuable consideration, is not bound by the notice to the first mortgagee.

M. ATKINSON, in March, 1810, executed a mortgage in fee to one Cade. Further advances were afterwards made; and by indenture of the 14th of May, 1814, the mortgage was transferred to, and the estate became vested in fee in John Burcham, subject to redemption on payment of 7,800*l.* and interest.

By indenture of the 3rd and 4th of December, 1815, after reciting the mortgage to Burcham, Atkinson conveyed the same property to Thomasine Smith in fee, subject to redemption on transferring to Mrs. Smith the sum of 2,100*l.*, Navy 5*l.* per cent. annuities.

It appeared that soon after the execution of this mortgage, Mrs. Smith wrote and sent to Mr. Burcham, the first mortgagee, the following letter :

“LINCOLN, Dec. 1815.

“MR. BURCHAM.

“SIR,—I understand you have a mortgage on the estate of M. Atkinson, of Fulbeck, for 6,000*l.*; and it being necessary that you should be informed, I have just got from him a second mortgage for 2,000*l.*, which was left to me by my late husband, Samuel Wood. If my writing to you, Sir, is not sufficient, I shall esteem it a favour, if you will inform me.”

Burcham afterwards advanced the further sum of 900*l.* to Atkinson, which, by *an indenture of the 10th of February, 1816, he charged on the same property.

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Atkinson, the mortgagor, subsequently persuaded the plaintiff Peacock to advance the sum of 12,000*l.* on the security of the property, on having a transfer of Burcham's mortgage; and accordingly, by indentures of the 12th and 13th of May, 1817,

(1) *West London Commercial Bank* (1885) 29 Ch. Div. 954, 54 L. J. Ch.
v. Reliance Permanent Building Society 1081, 53 L. T. 442.

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v.
BURT.

and made between Burcham, Atkinson, and Peacock, in consideration of 8,700*l.* paid by Peacock to Burcham, and of the further sum of 3,300*l.* paid by Peacock to Atkinson, the premises were conveyed to Peacock in fee, subject to redemption on payment of the sum of 12,000*l.* and interest; and afterwards, in 1813, Atkinson charged the property with the further sums of 1,000*l.* and 800*l.* to Peacock.

On a reference to the Master, it appeared that the estate was insufficient to pay all these incumbrances; and a question was then raised, whether Peacock was entitled to a priority to the whole extent of his security over the mortgage to Mrs. Smith, or, whether his priority was limited to the sum of 7,812*l.*, the amount due at the time Mrs. Smith gave notice of her security to Burcham.

Peacock insisted, that, having no notice of Mrs. Smith's mortgage at the time he advanced his money, and, possessing the legal estate, and the title deeds, he was entitled to a priority for the whole of his advances over Mrs. Smith's security; and the Master reported in his favour.

To this report Mrs. Smith took exceptions.

Mr. Bickersteth and *Mr. Wakefield*, for Mrs. Smith. * * *

Mr. Pemberton and *Mr. Bethel*, for Peacock [relied on *Brace v. The Duchess of Marlborough* (1)].

[35]

THE MASTER OF THE ROLLS :

The question is, whether a third mortgagee, who has advanced a further sum to a mortgagor, without notice of a second mortgage, and obtains a conveyance of the legal estate from the first mortgagee, who had notice of the second mortgage, can obtain a priority over the second. It is proved in this case, that the second mortgagee gave notice to the first, but not to the third mortgagee; and I think that the real question is, whether he is or is not a purchaser for valuable consideration without notice. It is said, that though he had no personal notice, yet he is affected with the notice of the vendor; but the knowledge of a vendor has never been held to bind a purchaser for valuable

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consideration without notice; and against this application of the rule there is no exception. It is true, that in *Mackreth v. Symmons* (1), Lord ELDON asks this question, "Is there any case where a third mortgagee has excluded a second, if the first mortgagee, when he conveyed to the third, knew of the second? When the case of *Maundrell v. Maundrell* (2) was before me, I looked for, but could not find such a case—that where there was bad faith on the part of the first mortgagee, that equity was applied." It appears from the report that *Sir S. Romilly* seems to have assented to this proposition; but the answer to the question put by Lord ELDON is to be found in those various cases which have settled, that up to the time of a decree, and pending a suit, a third mortgagee can buy up the first, and obtain a priority over the second: *Marsh v. Lee* (3), *Brace v. The Duchess of Marlborough*, *Belchier v. Butler* (4), *Belchier v. Renforth* (5). It is clear that these cases furnish a decisive answer to Lord ELDON's question; and, in fact, to give a third mortgagee, who has obtained the legal estate, a priority over the second, nothing further is necessary than to have advanced his money without notice of the second mortgage; and this priority may be obtained even during the pendency of a suit, for the equities of the two parties being equal, this Court refuses to interfere, not because one has a better, but because they have equal rights. It appears that Mr. Powel, in the second volume of his "Treatise on Mortgages," states the same objection, and he cites *Whalley v. Whalley* (6), and *Pomfret v. Lord Windsor* (7); but it will be found, on reference to those cases, that they have no application to the point, and that they do not even contain the facts which would raise the question—and this removes the weight of the objection. Upon these authorities, independently of other considerations, the third mortgagee (who is to all intents and purposes a purchaser for valuable consideration,) not having had notice, is entitled to the full benefit of his legal rights and remedies. It has been supposed that the cases of *Dearle v.*

(1) 10 R. R. 85 (15 Ves. 329, 335).

(2) 7 R. R. 393 (7 Ves. 567; 10 Ves. 246).

(3) 2 Ventr. 337.

(4) 1 Eden, 523.

(5) 6 Br. P. C. 28.

(6) 1 Vern. 484.

(7) 2 Ves. Sen. 485.

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[*36]

Hall (1), *Loveridge v. Cooper*, *Foster v. Blackstone* (2), determine the point; but, in my opinion, the decisions in those cases proceeded on different principles; they merely decided that as between parties having equities only, he who first gives notice obtains a priority; and this is apparent when we look at the grounds on which those cases were decided. Sir THOMAS PLUMER proceeded on the principle, that it was not possible to transfer the legal interest, but that wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it, which a court of equity considers tantamount to possession, namely, notice given to the legal depository of the fund. "The question here is," says his Honour, "not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate." So again, Lord LYNDEHURST, in affirming the judgment of Sir T. PLUMER, states, as a reason for coming to the same conclusion, "that the act of giving the trustee notice was, in a certain degree, taking possession of the fund, and that it was going as far towards equitable possession as it was possible to go." So *that those cases, so far as they apply, are very strong decisions in favour of Peacock; for they decide that a second incumbrancer, without notice, having obtained a *quasi* legal title in a chose in action, gains a priority over the prior incumbrancer: here Peacock has the actual legal estate. Those cases certainly furnish no argument against the legal right of the third incumbrancer; I therefore think, that Mrs. Smith's mortgage must be postponed to that of the plaintiff.

1834.
Dec. 27.

KILMINSTER v. NOEL.

(4 L. J. (N. S.) Ch. 52.)

PEPYS, M.R.
[52]

Infant—Parent and child.

The Court will, under peculiar circumstances, sanction an allowance to infants out of the capital of their reversionary property, although the father be living.

MR. —, being entitled to certain property for life, with remainder to his children, who were infants, was, by the

(1) 27 R. R. 1 (3 Russ. 1). (2) 36 R. R. 334 (1 My. & K. 297).

decree in this cause, ordered to pay certain sums of money personally. KILMINSTER
v.
NOEL.

Mr. Beames, on speaking to the minutes, proposed that this sum should be paid out of the *corpus* of the settled property, instead of being paid by the father personally, in consideration of his securing to the children an annual allowance for their maintenance out of his life estate, they being altogether destitute, and the father residing abroad: he asked, therefore, that a reference might be made to the Master, to inquire and state to the Court, whether, reference being had to the circumstances, such an arrangement would be for the benefit of the infants.

Mr. Bickersteth supported the application, but admitted that he did not remember a similar order.

THE MASTER OF THE ROLLS :

This is, in fact, an application to authorize part of the interest in remainder, to be paid to the father, in consideration of his making a present annual allowance: or, in other words, an application to make to these children an allowance for their maintenance out of their reversionary capital. This is very seldom done; but, if the children are actually destitute, you may take the reference to the Master.

BALDWIN v. LEWIS.

(4 L. J. (N. S.) Ch. 113.)

Mortgagee in possession—Annual rests.

The mere circumstance that a mortgagee has recovered the mortgaged property by ejectment, and has retained possession, is not sufficient to induce the Court to direct annual rests to be made in the accounts between a mortgagor and mortgagee, although the rents exceed the interest.

MR. AGAR (with whom was *Mr. Phillimore*), for the mortgagee, asked, that in the decree for taking the accounts between a mortgagor and mortgagee, a direction should be contained for making annual rests. The special ground made by them in

1835.

March 14.

SHADWELL,
V.-C.

[113]

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LEWIS.

support of the application was, that the mortgagee had recovered possession by ejectment, had been in possession for some time, and that the annual rents exceeded the annual interest.

Mr. Knight, contra.

The VICE-CHANCELLOR thought that the circumstances stated were insufficient to entitle the mortgagee to annual rests in the accounts.

1834.
Dec. 2.

TARBUCK v. TARBUCK (1).

(4 L. J. (N. S.) Ch. 129—132.)

PEPYS, M.R.

1835.
Feb. 2.

PEPYS, M.R.

[129]

Devise—Construction—Lapse.

A testator devised an estate to his son A. for life, with remainder equally amongst all the children of A. and their heirs, as tenants in common. He devised another estate to B. and his children, in the same terms; and in case his son A. died without leaving lawful issue, he gave the estate so previously devised to A. unto B. and his heirs, and made a similar devise *mutatis mutandis* if B. died without leaving lawful issue; but if both his sons should die without leaving lawful issue, then he gave the estates over to C. in fee. The testator's son A. alone had issue, a son, and both the sons of the testator, and also the son of A., died in the lifetime of the testator: Held, that the gift over to C. did not take effect.

A similar decision made as to leaseholds.

THE testator by his will devised certain hereditaments unto his son James for the term of his natural life, without impeachment of waste, and, immediately after his decease, then unto and equally amongst all the children of the said son James, share and share alike, and to their respective heirs and assigns for ever as tenants in common; and if but one only child, then the said testator gave and devised the same to such only child, his or her heirs or assigns for ever, chargeable as therein mentioned. And the said testator also gave and devised all his other messuages and dwelling-houses, buildings, lands, and hereditaments, whatsoever and wheresoever, unto his son Jonathan, for and during the term of his natural life, without impeachment *of waste; and from and after his decease, then unto and equally amongst all the children of his said son

[*130]

(1) *Brookman v. Smith* (1872) L. R. 7 Ex. 271, 41 L. J. Ex. 114, 26 L. T. 974.

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Jonathan, lawfully to be begotten, share and share alike, or to their respective heirs and assigns for ever, and for and during all his, the said testator's term and interest therein respectively, as tenants in common; and if but one only child, then the said testator gave and devised the same to such only child, his or her heirs or assigns for ever, and for and during all his term and interest therein respectively, chargeable as therein mentioned; and in case his said son James should happen to die without leaving lawful issue, then he gave and devised the said hereditaments, so devised to him for his life as aforesaid, unto his, the said testator's, son Jonathan, his heirs and assigns for ever; and in case his said son Jonathan should happen to die without leaving lawful issue, then the said testator gave and devised the said hereditaments so devised to him for his life as aforesaid, unto his, the said testator's, son James, his heirs and assigns for ever, or for and during all his, the said testator's, term and interest therein respectively; but if both his, the said testator's, said sons, James and Jonathan, should happen to die without leaving lawful issue, then the said testator gave and devised the whole of the said messuages, hereditaments, &c. equally, unto and amongst all his, the said testator's, nephews and nieces, share and share alike, and to their respective heirs and assigns for ever, or for and during all his, the said testator's, estate, term, and interest therein respectively, as tenants in common.

At the date of the will, neither of the testator's sons had any children, and they both died in the lifetime of the testator. James, one of the testator's sons, left one child, a son, who survived his father James and his uncle Jonathan, but who subsequently died in the lifetime of the testator, and Jonathan died without children. The testator died, seised of freehold estates, and possessed of leasehold for lives and years, all of which were included in the above devise; and the question was, whether, under the circumstances, the devise over to the nephews and nieces took effect.

Mr. Pemberton and *Mr. Sharpe*, for the defendant, the heir-at-law. * * *

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Mr. Bickersteth and *Mr. Rogers*, for the plaintiffs, the nephews and nieces, *Mr. Kindersley*, for other defendants, also nephews, and *Mr. Ellis*, for other defendants, also nephews and nieces.

[The arguments and cases cited, both for the plaintiffs and defendants, were fully noticed in the judgment.]

[131] THE MASTER OF THE ROLLS :

It appears that the testator's son James died in 1814, leaving a son, James ; the testator's son Jonathan died in 1824 without issue. James, the son of the testator's son James, died in 1824, and the testator himself died in 1831 ; so that the devises in favour of the testator's sons, James and Jonathan, and their children, lapsed and failed. On the part of the nephews and nieces it was contended, that, in the events which have happened, they are entitled under the devise to them. On the part of the heir-at-law of the testator, it was contended, that as the events have not happened upon which alone the nephews and nieces were to be entitled, the devise to them cannot take effect, and that therefore there is an intestacy.

The first question to be considered is, what estates would James and Jonathan have taken had they survived the testator ? On the part of the nephews and nieces it was contended, that they would have taken estates tail, upon the ground that the gift over being to take effect in case either died without leaving lawful issue, is, as to real estates, a gift over after an indefinite failure of issue, and therefore, upon the authority of many cases, enlarges or limits the estates previously given, so as to create an estate tail. This rule has been adopted for the purpose of giving effect to the general intention of the testator, manifested by his making the gift over depend on a failure of issue generally, and for the purpose of giving a chance at least of succession to persons who, though they cannot claim under the particular gift, are included in the general description of issue. The rule, therefore, does not apply where this object is not to be attained, and amongst the exceptions to it is the very case which occurs here, namely, a gift to A. for life, with

remainder to the children of A. in fee, that is, to the children of A. in fee generally, and a gift over on the death of A. without issue, which means such issue or children. This was the case of *Goodright d. Docking v. Dunham*, which is precisely in point. In such cases, the general term "issue" is construed to mean that particular description of issue before specified, namely, children. It was indeed in this case, as it has been in former cases, contended, that such construction is a restriction of the meaning of the term issue, because thereby children's children would be excluded in the event of their parent's death before the testator's; but this argument has not prevailed against the rational construction of making the gift over depend on the failure of the objects before distinctly specified. Such was the case of *Blackborn v. Edgley* (1), and *Morse v. Lord Ormonde* (2). It is also to be observed, that in this case the gift is to the children of James and Jonathan, equally to be divided amongst them, a provision which is wholly inconsistent with an estate tail in James and Jonathan, and which would be defeated by giving such an estate to them; and this was a circumstance much relied on in *Doe d. Strong v. Goff* (3), and in *Gretton v. Haward* (4). I am therefore of opinion, that if James and Jonathan had survived the testator, they would have taken estates for life, with remainder to their children in fee, but with executory devises over, in the event of their leaving no children at the times of the death of the respective tenants for life; and if this be the true construction of the devise, it is clear the gift to the nephews and nieces could never have taken effect, for that gift is only to take effect in the event of James and Jonathan dying without lawful issue, that is, children to the above construction, and James, at the time of his death, had a *son, namely, James, who survived both his father and his uncle Jonathan.

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The only remaining question is, whether the circumstance of James, and his son, and Jonathan, having died in the testator's lifetime makes any difference. The distinction is very nice between those cases, in which executory limitations

(1) 1 P. Wms. 600.

(2) 25 R. R. 85 (5 Madd. 99).

(3) 11 East, 668.

(4) 6 Taunt. 94.

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have been held not to be defeated by the failure of a prior estate, as in *Avelyn v. Ward*, *Jones v. Westcomb*, *Murray v. Jones* (1), and the opposite class of cases, in which it has been held, that subsequent limitations do not arise, although the preceding estates fail, because the event in which the estate was to go over had not arisen. The principle, however, is well established, although there has sometimes been some confusion in the application of it. It is, as I conceive, clear, that if James and Jonathan had survived the testator, the devise to the nephews and nieces could not have taken effect under the circumstances which happened; and it is, I think, established by authority, that the situation of the parties is not altered by their having died before the testator: *Williams v. Chitty* (2), *Calthorpe v. Gough* (3), *Doo v. Brabant* (4), and *Humberstone v. Stanton* (5), are decided cases on this point. I am therefore of opinion that the event, on which the nephews and nieces were to take, did not happen; and that consequently there is an intestacy. The same declaration with regard to the leaseholds follows of course.

1835.
May 2, 4, 5.
PEPYS, M.R.
[172]

GOODWIN v. WAGHORN.

(4 L. J. (N. S.) Ch. 172—174.)

A purchaser who has paid his purchase-money and has taken possession, but who has taken no conveyance and has had no title deeds delivered to him, can create an equitable mortgage by depositing the written contract under which the property was purchased by him.

[In the month of December, 1806, Thomas Goodwin contracted with William Longley for the purchase of a lodge, slaughter-house, and premises, and he afterwards applied to the defendant for the loan of 200*l.* upon the security, to enable him to complete the purchase, the defendant, for that purpose, and on the security of the said premises, lent him the sum of 200*l.*, for which sum Goodwin gave to the defendant, as a further security,

(1) 13 R. R. 104 (2 V. & B. 313).
(2) 3 R. R. 71 (3 Ves. 545).
(3) 2 R. R. 505, n. (4 T. R. 707, n.).

(4) 2 R. R. 503 (4 T. R. 706).
(5) 12 R. R. 243 (1 V. & B. 385).

his promissory note. On the 7th of July, 1809, Goodwin completed the purchase with the money so advanced by the defendant, and on that occasion W. Longley gave Goodwin the following receipt:] “Received the 7th of July, 1809, of Mr. Thomas Goodwin 149*l.*, which, with 1*l.* before paid, make 150*l.*, being the purchase-money for a lodge, slaughter-house, bullock-pound, and stack plat ground adjoining Mr. Goodwin’s premises in Tenterden, purchased by Mr. Goodwin of me, and also 18*l.* 15*s.* for two years and a half’s interest due on the purchase-money, making in all 167*l.* 15*s.*, and which sum I receive in full of all demands whatever.—WILLIAM LONGLEY.”

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To this receipt was attached a certified plan of the premises, and on it was written the words following: “A plan of a stack-yard, hog-pound, dung-pit, cart-lodge, lodge and yard, and slaughter-pound, the estate of William Longley, adjoining the ‘Lion’ yard, and the yard of Thomas Goodwin, in Tenterden, sold to Mr. Goodwin for 150*l.*” No conveyance of these premises was ever made by Longley to [Goodwin], or any person on his behalf; and the only muniments of title of these premises ever possessed by [Goodwin] were the receipt and the certified plan thereto attached. The answer stated, that the receipt and plan were delivered to the defendant as a security for the repayment of the sum lent by her to [Goodwin]; and the defendant insisted that she had in equity a mortgage of the premises, and that at least she had a lien thereon for the purchase-money and interest thereon. [Goodwin’s widow and children disputed the validity of the alleged mortgage or lien after his death.]

Mr. Pemberton and *Mr. C. C. Barber*, *for the plain-
tiffs. * * *

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Mr. James Russell, for the defendant. * * *

Mr. Pemberton, in reply. * * *

The MASTER OF THE ROLLS [after stating the facts and observing that the 200*l.* was not advanced as part of the purchase-money, but as a loan of money, and therefore there was no

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lien on the ground of the purchase-money being paid by the defendant, continued as follows:]

The Court is always anxious, in cases of mortgages, to prevent further litigation, and, in restoring an estate, which is absolute at law, is very desirous of arranging all the equities between the parties. As the case stands, the purchase remained in contract, and no title deeds had been delivered; and the receipt, which was put into the hands of the defendant, contained the terms of the contract, and left no ambiguity as to the terms.

It is settled, that if an equitable mortgage be originally created, it may afterwards be extended by parol; this appears from the decision in *Ex parte Kensington* (1); and title deeds are not the only things by the deposit of which an equitable mortgage may be obtained, for in the case of *Ex parte Warner* (2), an equitable lien on a copyhold estate was obtained by the deposit of the copy of court rolls. Now, the copies of court rolls are not the title-deeds, yet, it is clear, the deposit of them would be sufficient to give an equitable mortgage; and, in argument, Sir S. Romilly cites a case, where the deposit of a mere agreement was held sufficient to create such a lien; but it is not stated where that decision is reported. But if *the deposit of the copies of court roll be sufficient, I cannot see why an agreement should not also be sufficient. The deposit of the copy of the roll is held to create an equitable mortgage, because it is the best evidence of title that the party has the power of depositing; so the agreement for purchase is the best evidence of title, until the contract is completed, and the title deeds are handed over; and in this case there was a deposit of that which was the best evidence, and subsequently by parol there was an agreement to extend it. I think this case is within the rule, and that an inquiry should be directed. * * *

[*174]

(1) 13 R. R. 32 (2 V. & B. 79). (2) 12 R. R. 169 (19 Ves. 202).

COLLINS *v.* JOHNSON.

(4 L. J. (N. S.) Ch. 226—228; S. C. 8 Simons, 356, n.)

1835.

June 30.

PEPYS, M.R.

[226]

A legacy given to A., and, in case of his death before his legacy should become payable, upon trust for his issue: Held, not to lapse by A.'s death in the testator's life, but to belong to his children.

THE testator, Thomas Johnson, by his will dated the 5th of January, 1831, gave to his executors all his personal estate, in trust to convert and invest the same, and to pay the interest to his wife for life; and he devised to them all his real estate upon trust for his wife for life, unless she should prefer to have a sale, in which case he directed his executors to sell all his freehold and leasehold estates, and to stand possessed of the monies to arise and be got in by the means aforesaid; and under and by virtue of his will, upon trust nevertheless to pay to such person and persons, and in such parts, shares, and proportions, manner and form as thereafter mentioned and expressed. The testator then gave certain pecuniary legacies to his nephews and nieces, and, amongst others, to his nephew William Hughes and his niece Ann Charlton, 250*l.* each; and declared, that in the event of any or either of his nephews or nieces before named departing this life before his, her, or their said legacy or legacies should become due and payable, his executors should pay and divide the legacy or legacies, sum or sums of money, of him, her, or them so dying and leaving issue, unto his, her, or their issue, share and share alike; if more than one, the payment thereof to be made to such of them as should not have attained their several ages of twenty-one years, to be postponed until they should have respectively attained that age, and the interest, dividends, and produce thereof, in the meantime, to be paid and applied for and towards their respective maintenance, education, and support. * * *

William Hughes, the testator's nephew, died in the testator's lifetime; [and a question arose] whether the interest of William Hughes lapsed by his death in the lifetime of the testator, or went over to his children. * * *

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Mr. Bickersteth and *Mr. Bagshaw*, for the plaintiff.

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JOHNSON.

Mr. Pemberton, Mr. Sidebottom, Mr. L. Lowndes, Mr. Spence, Mr. Richards, Mr. Nichol, and Mr. Collins, for other parties.

[Among the cases cited were *Thornhill v. Thornhill* (1), *Corbyn v. French* (2), *Bone v. Cook* (3).

July 1.

THE MASTER OF THE ROLLS :

* * The first question was, as to the interest of the children of William Hughes, who was a legatee under the will of the testator. The words of the will were [His Honour here read the words.] William died in the lifetime of the testator; and the question is, whether William Hughes's children were or were not necessary parties, for, if not, it is desirable that the expense of keeping them before the Court should be saved. I think there is no doubt that these children were substituted for their father, and that, therefore, they are necessary parties to the suit. * * *

1835.
June 17.

PEPYS, M.R.

July 18.

SHADWELL,
V.-C.
[232]

WALKER v. TILLOTT.

(4 L. J. (N. S.) Ch. 232—233.)

Will—Construction—Tenant for life—Long Annuities.

A testator gave all interest and dividends of all such stock as he might have in the public Funds to one for life, and gave "the principal money so invested," to others in remainder; he possessed a sum of 220*l.* Long Annuities at his death: Held, a specific gift of the Long Annuities for life; and that the parties in remainder were not entitled to have the Long Annuities converted, and the produce invested for their benefit, in a fund which was not perishable.

THE question arose on a will and codicil in the following terms: "As to my worldly estate, I give and bequeath the same in the manner following, that is to say, I give and bequeath unto my daughter Sophia Banister, now Sophia Tillott, all interest and dividends of all such stock as I may have in the public Funds, also the annual profits arising from my leasehold estates, . . . and from and after the death of my said daughter, it is my will and desire, that the principal money so invested in the public Funds, be divided amongst her children."

(1) 20 R. R. 315 (4 Madd. 377).

(2) 4 R. R. 254 (4 Ves. 418).

(3) 28 R. R. 697 (M'Clel. 168).

The testator then declared certain trusts of his said principal stock in favour of the next of kin, in the event of there being no child, or one only.

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The testator afterwards made the following codicil: "Interest of the money in the Funds, to be left to Sophia Tillott, during her life, and at her death, to the child or children, arriving at the age of twenty-one or day of marriage; then the principal to be divided equally among the following persons, share and share alike, viz. S. W., P. W.," &c.

The testator possessed at his death, the sum of 220*l.* Long Annuities, and the question was, whether the sum ought to be converted and invested in 3*l.* per cents., or whether the tenant for life was entitled to the amount annually produced by the Long Annuities. The case first came on at the Rolls, before the hearing, on a motion, that the money might be brought into Court.

For the plaintiffs it was contended, that the trustees had committed a breach of trust, in not converting the Long Annuities, which, being of a perishable nature, ought to have been converted, otherwise it would be impossible to effectuate the testator's intention of preserving "the principal" for those in remainder: *Howe v. Earl Dartmouth* (1), and *Dimes v. Scott* (2). That the Long Annuities, which would terminate in the year 1860, were not, strictly speaking, stock in the public Funds, for there was no principal. That as there was a question to be decided, the fund ought to be protected until the point had been settled.

For the defendant it was contended, that this was a specific gift of the Long Annuities to the daughter for her life, and not a general gift of personal estate, which was not enumerated, to one for life, and to another in remainder; that this was like a specific gift of a leasehold to one for life, with remainder to another.

THE MASTER OF THE ROLLS:

June 26.

This was an application for transferring into Court a sum of Long Annuities, on the ground, that the tenant for life of this

(1) 6 R. R. 96 (7 Ves. 137).

(2) 28 R. R. 46 (4 Russ. 195).

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fund and the residue is not entitled to the income of the Long Annuities, as being a perishable fund; and the question turns on, whether this is a specific gift of the fund in question, to one for life, or only a gift of the interest to be produced by the capital sum. I have considered the will, which is much altered from the probate copy. [His Honour here read the will.] This is a gift for life of all his stock in the Funds, to be ascertained by the stock he might have at the time of his death; and I think that he intended to give the stock, and not the money invested in the stock. Now, having made this will, he makes a codicil, and the question is, whether it alters the previous gift. [His Honour here read the codicil.] The words "money in the Funds," *per se*, might raise a question.

It is quite clear, he did not intend to make a variation as to the mode in which the tenant for life was to take. I therefore think this a specific gift of the Long Annuities to the daughter for her life.

July 18.
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The cause came on to be heard before his Honour the Vice-Chancellor, who concurred in the opinion of the MASTER OF THE ROLLS, that this was a specific gift of the Long Annuities, to one for life, and decreed the same accordingly.

1835.
 May 5.
 August 13.
 PEPYS, M.R.
 [256]

CAMDEN v. BENSON.

(4 L. J. (N. S.) Ch. 256—258.)

Will—Construction—Maintenance—Parent and child.

Bequest to a widow for life in support of herself and her three children. One of the children (a daughter) attained twenty-one, and afterwards married: Held, that the trust for such daughter's support, ceased upon her marriage.

ROBERT SEAMAN, the testator, by his will, dated the 30th of May, 1816, devised and bequeathed his real and personal estate unto Dr. Scott, Dr. Benson, and his daughter, Sarah Hesketh, upon trust, to sell his real and personal estate, and lay out the monies arising from the same in the purchase of Bank stock; and the interest arising therefrom, after the payment of certain legacies, he gave and bequeathed unto the aforesaid Sarah

Hesketh during her life in support of herself and three children, namely, Sarah Hesketh, Thomas Hesketh, and Maria Hesketh, and also of such child or children as his said daughter might thereafter have; and after her death the Bank stock to be equally divided between her said three children, or such other child as she might thereafter have.

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The testator died in 1821, and the plaintiff, Sarah Camden, one of the three children of Sarah Hesketh, attained twenty-one in the same year, and continued to reside with her mother, and was supported by her until the year 1832, when she married the plaintiff, G. J. S. Camden, and left her mother's house. Sarah Hesketh, the mother, continued to receive the whole of the dividends, and annual produce of the property up to the time of her death in March, 1834; and the question raised at the hearing was, whether, under the bequest to Sarah Hesketh during her life, in support of herself and three children, the plaintiff was, after her marriage, and during her mother's life, entitled to any portion of the income.

Mr. Pemberton and Mr. James Russell, for the plaintiff :

* * There is no case which decides this point; but the cases shew that the parent is bound under similar bequests to maintain the children out of the property. There is no doubt that Mrs. Hesketh was bound to maintain them during their minority: the only question is, where it is to stop. There is nothing in these words to limit the continuance of this support, and the children are as much entitled to it after they have attained twenty-one as before: there is nothing to confine the benefit intended by the testator for the children to the period during which they were resident with their mother. * * *

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*Mr. Bickersteth and Mr. Blake, contrà. * * **

THE MASTER OF THE ROLLS [after stating the facts of the case, said :]

August 14.

It is said to be a new question, and that representation appears quite correct; and although the question is not here very important, yet it may be very important in future cases

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v.
BENSON.

of a similar nature. The question turns on this consideration, whether the plaintiff is entitled, as the object of the bounty of the testator, to a distinct gift to herself, or whether it is a gift to the mother, with a burthen imposed on her of maintaining her children, and which was to cease on the necessity of maintenance ceasing. If a gift is to the mother and her children, then the children are entitled; but if to the mother to maintain her children, the mother is alone entitled, if the other objects cease to require the testator's bounty. In looking into all the cases, I find that is the doctrine.

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[After referring to a number of cases on gifts of this class, concluding with *Thurston v. Essington* (1) and *Hamley v. Gilbert* (2), his Honour said:] In the last two cases the children were considered objects of bounty only *sub modo*, and their utmost claim would be while maintenance was required; but a married woman can claim maintenance from no other person but her husband. This is not a gift to the mother and daughter, but to the mother alone, for supporting herself and her children; and I am of opinion that the daughter cannot be a burthen on the life-estate of the mother after her marriage, but that she then ceased to have any claim.

COURT OF EXCHEQUER (EQUITY).

1834.
Nov. 20.

COATES v. STEVENS.

(1 Y. & C. 66—75.)

[66]

A testator bequeathed 2,200*l.* stock, his property, standing in the joint names of himself and wife, to trustees, upon trust to pay the interest and dividends to his wife for her life, and, after her decease, to distribute the capital amongst his grandchildren by name; and he directed that in case he had not that sum standing in his name at the time of his death, the same should be made up out of his other estate and effects: Held, that the stock was the absolute property of the wife surviving, and that she must elect between this and the other benefits bequeathed to her by the testator's will.

SILAS STEVENS, by his will, dated the 25th April, 1823, after directing his just debts, &c. to be paid, gave and bequeathed all

(1) Jacob, 361, *n.*

(2) *Ibid.* 354; see 38 R. R. 189, *n.*

his household goods and furniture, plate, linen, and china, and also his ready money, bills, &c., unto his dear wife, Sarah Stevens, for her absolute use and benefit; and he gave and devised certain leasehold messuages [unto his said wife for her life; and, after her decease, to John Montague and Robert Briggs, their executors, administrators, and assigns, upon trust, after the decease of his said wife, to sell the same, and invest the net proceeds in the purchase of stock, or upon real securities, and to hold the same and the income thereof, upon the same trusts as were thereafter declared concerning the capital sum of 2,200*l.*, 3*l.* per cent. Reduced Bank Annuities; and he thereby gave and bequeathed unto the said trustees] the capital sum of 2,200*l.*, 3*l.* per cent. Reduced Bank Annuities, his property, then standing in the joint names of himself and his wife in the books of the Governor and Company of the Bank of England; and he empowered his said trustees, or the survivor of them, his executors or administrators, with the consent in writing of his said wife during her life, and, after her decease, at their own discretion, to vary the securities on which the said sum might be invested; and in case the said testator should not have 2,200*l.*, 3*l.* per cent. Reduced Bank Annuities *standing in his name at the time of his decease, then he directed the said sum of 2,200*l.* of the said annuities to be made up out of the said other parts of his said estate and effects; and [he thereby directed, that the said trustees should stand possessed of the said stock, upon trust to pay the income thereof to his said wife, for her life; and after her decease to transfer or pay the said capital sum unto and between his grandchildren, in equal shares as therein mentioned. And, after payment of all his just debts and funeral and testamentary expenses, the testator gave and bequeathed all the residue of his personal estate whatsoever unto his said wife absolutely. The will] *then contained a power of appointing new trustees, with the consent and approbation of Sarah Stevens; and the testator appointed his said wife, Sarah Stevens, and the said John Montague and H. R. Briggs, joint executrix and executors of his said will.

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r.
STEVENS.

[*67]

[*68]

The testator died in August, 1832, leaving his wife and several of his grandchildren surviving him. The trustees declined to

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act in the trusts of the will, or as executors. The wife proved the will, and took upon herself the administration of the testator's estate.

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The bill was filed by the grandchildren, acting by George Coates, their father and next friend, against Sarah Stevens, the trustees, and the Bank of England. After stating the will and death of the testator, it alleged that Sarah Stevens had possessed herself of the personal estate, and paid the greater part of the testator's debts and funeral expenses. That at the death of the said testator, there was standing in the name of himself and the said Sarah Stevens, in the Bank books, a sum of 1,900*l.* Reduced 3*l.* per cent. Bank Annuities; that she had already transferred and sold out a portion thereof, and applied the produce thereof to her own purposes; but that a sum of 1,800*l.*, of the same stock, continued to stand in the names of the said Silas Stevens and Sarah Stevens [and that she threatened and intended to transfer and apply the same to her own purposes; the bill prayed] that the trusts of the will might be declared; that the defendant Sarah Stevens might be restrained by injunction from transferring and selling the said sum of 1,800*l.* stock; that a receiver might be appointed; that the defendant Sarah Stevens might be compelled to consent to the appointment of new trustees, to be approved by the Master; that the said 1,800*l.* stock might be transferred into their names; that all proper deeds might be executed, and that the said sum of 2,200*l.*, Reduced 3*l.* per cent. Bank Annuities, might be directed to be made up out of the other parts of the estate of the testator.

The defendant, Sarah Stevens, by her answer, admitted the will of the testator, and that he died possessed of the leasehold and other personal property therein mentioned. She likewise stated that he was, at the time of his will and death, seised of a small freehold and copyhold property in the county of Oxford, out of which she submitted she was entitled to dower or freebench. That, upon, or shortly after the marriage with her late husband, many years ago, her husband became possessed of considerable personal estate, and that he employed the same, or the proceeds thereof, in his trade or business of an oil and colour-man; and that out of the profits of his said business,

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C.
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he from time to time, during his life, invested divers sums of money in the purchase of Bank Annuities, in the joint names of himself and of the defendant, his wife. That, her said late husband having discovered that a sum of 200*l.* Bank Annuities had been invested, and was standing in the name of defendant, he had shortly afterwards procured the same sum of Bank Annuities to be transferred into the joint names of himself and of defendant, his wife. That *divers sums, parts of the Bank Annuities, so invested in and transferred into the joint names aforesaid, were sold out on several occasions during the life of the said Silas Stevens. That her said late husband [never sold] the said Bank Annuities, or any part thereof, without obtaining the concurrence of the defendant in such sale; and that he sometimes insisted on the defendant's being a party to the transfer thereof. That by means of such investments, sales, and transfers as aforesaid, she admitted there was standing in the joint names of the said testator Silas Stevens, and of [herself the defendant] in the books of the Governor and Company of the Bank of England, at the time of the death of the said testator, a sum of 1,900*l.*, Reduced 3*l.* per cent. Bank Annuities; but she submitted and insisted, that, under the circumstances stated, the said sum of 1,900*l.* Bank Annuities became, upon the death of her said late husband, her absolute property. She admitted that she had sold out 100*l.*, part thereof, and applied the produce to the payment of the testator's testamentary and funeral expenses, and the residue to her own use, but this she submitted she had a right to do. She also submitted, that she was not bound, by the directions contained in the said will or otherwise, to make up, out of the other parts of the estate and effects of the said testator, or any part thereof, the sum of 2,200*l.*, Reduced 3*l.* per cent. Bank Annuities, or any other sum; but that the sum ought, if at all, to be made up out of the said freehold or copyhold hereditaments, and all other the real estates, if any, of her said late husband's, after setting out or allowing for defendant's dower or freebench therein; and also out of his personal estate and effects, if any, not specifically bequeathed by his said will, and not required for the payment of his debts. She further stated, that she believed that George

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Silas Coates, one of the grandchildren, had possessed *himself of and still retained the testator's furniture, plate, linen, &c., and had never accounted for the same, and likewise the title deeds of the said several real estates: and she alleged, that, in January last, he had removed her from the house in Windmill Street, where she had theretofore resided, and had taken possession of the premises.

An injunction having been obtained *ex parte*, founded on the several statements made in the bill, a motion was now made to dissolve that injunction.

[72] *Mr. Simpkinson* and *Mr. H. W. Busk*, for the motion [cited *Dummer v. Pitcher* (1) and other cases]. These cases establish that it is a gift to the wife, unless it can be shewn that the husband entertained a contrary intention at the time when the act was done. That must be shewn by contemporaneous evidence alone; and the mere fact of his bequeathing, is no evidence of the husband's intention at the time of the purchase. The utmost extent to which the plaintiffs can go is, that it will put the wife to her election. Joint purchases are, perhaps, more common in the cases of father and son than of husband and wife. In many of these cases the father devises away property which he has taken in the joint names of himself and son, and the devise goes for nothing: *Dyer v. Dyer* (2), *Finch v. Finch* (3), [*73] *Murless v. Franklin* (4), and *Crabb v. Crabb* (5).] *In the present case, there is no allegation of contemporaneous acts, either in the bill or the affidavits, by which it may be inferred, that, at the time of the joint purchase, the husband intended the wife to be a trustee for him.

(THE LORD CHIEF BARON: How can this case be distinguished from that in the Vice-Chancellor's Court? There the husband took upon himself to dispose of funded property by his will. That is the same as the present case. The words here, indeed, are more definite. There the bequest was not sufficiently

(1) 39 R. R. 203 (5 Sim. 35; 2 Myl. & K. 262).

(2) 2 R. R. 14 (2 Cox, 92; 1 P. Wms. 112, n.).

(3) 10 R. R. 12 (15 Ves. 43).

(4) 18 R. R. 3 (1 Swanst. 13).

(5) 36 R. R. 362 (1 Myl. & K. 511).

specific to raise a case of election; here it is. There are circumstances, too, in this case, which there were not in the other, tending to rebut the notion that the wife should be a trustee. The husband always asked for her assent and concurrence. It appears to me that the only question is, whether I should retain possession of the property till the hearing, or decide the case now.)

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Mr. Jervis and Mr. James Stewart, contra :

* * At all events the injunction should be continued till the hearing, in order that the material facts of the case may be proved. [We may be able to prove contemporaneous acts of the testator at the time of investment, shewing that it was a trust in the wife.]

(THE LORD CHIEF BARON: You knew the fact of the joint purchase, and might have been prepared with evidence to shew a trust in the wife. The *onus* of proving the trust lay upon you.)

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The point of election might be argued at the hearing.

(THE LORD CHIEF BARON: She has made her election; she must give up the rest of the property; and I wish to know whether she is in possession of the rents of any of the property.)

Simpkinson, in reply :

It appears by the answer, that she was in possession of the rents and profits of the freehold cottage, and resided in another of the houses till January last, when she was removed; that she has received none of the rents of the leasehold, and that they have sold the furniture.

THE LORD CHIEF BARON :

I am satisfied upon the affidavits and the answer, that the defendant Sarah Stevens is not in possession of any other part of the testator's property; therefore, there is no reason why the property in question should be retained to answer the purposes

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of justice. I am of opinion, upon all the decisions, that this is the absolute property of the defendant. The transfers were made to the husband and wife in their joint names, and *there is no evidence to shew that these transfers were coupled with any trust. I am of opinion, therefore, that, as it is her absolute property, and she has made her election, the injunction must be dissolved. There is no suggestion by the plaintiffs that they can prove any fact beyond what is already in evidence; and, even if they could, they would have no ground for the application, inasmuch as they are not taken by surprise, by any thing contained in the answer. She has not insisted on any right to which she was not properly entitled; there was, therefore, no ground for the injunction, and the plaintiffs ought not to have made the application.

Dissolve the injunction, with costs.

1834.
Nov. 26, 29.
Hearing.
1835.
July 11, 13.

PRICE v. ASSHETON.

(Motion, 1 Y. & C. 82—93; hearing, 441—444; S. C. 4 L. J. (N. S.)
Ex. Eq. 3.)

Where an agreement to renew a lease contains no stipulation as to the term of its duration, it is implied that the new lease shall be of the same duration as the old.

One having a power to lease at the most improved rent agrees to grant a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements are deemed part of the consideration for the lease. *Quære* whether such a lease is consistent with the terms of the power?

Bill for specific performance of an agreement to renew a lease, dismissed; the agreement being too vague and uncertain to be executed by the Court.

The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease.

THE plaintiff was lessee of two houses, one situate in Cannon Street, the other in St. Lawrence Pountney Lane, under two leases for twenty-one years, each dated the 13th November, 1812, originally granted to one Atkinson. In the year 1816, the defendant, William Assheton, by virtue of his marriage

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settlement, became tenant for life of the premises, with a power to lease for thirty-one years, at the most improved rent. The leases held by the plaintiff having nearly expired, the present bill was filed by him for the specific performance of an alleged agreement by the defendant to renew these leases, and for an injunction to restrain two actions of ejectment. The bill alleged, that in the year 1822 the plaintiff applied to the defendant for a reduction of his rent, or that he might be permitted to make certain alterations, in order to enable him to underlet part of the premises. That, in consequence of this proposal, the defendant sent a surveyor to the premises, to ascertain the nature of the improvements proposed; but he subsequently wrote a letter, observing that the alterations would be of no ultimate advantage to him, and declining to grant an extension of the term. That the plaintiff then wrote a letter to the defendant, containing a farther explanation of the proposed alterations; and that the defendant, on the 10th June, 1823, called on the plaintiff, when the plaintiff explained to him the alterations he intended to make, and the probable costs. That at this interview the defendant declined to reduce the rents, but agreed to grant a new lease of the two houses and premises for the further term of twenty-one years, to commence from the expiration of the leases before mentioned, at such *rents as the premises should upon a fair valuation be worth at the expiration of the leases; but not to exceed the former rents, nor calculating any thing by reason of the improvements; and that, upon such occasion, the defendant promised to the plaintiff to sign an agreement in writing, to the effect of the verbal agreement, and to forward it to the plaintiff next day. The bill then alleged, that, in consequence of the defendant's promise at this interview, he, on the following day, wrote and sent to the plaintiff the following letter, dated 11th June, 1823:

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“SIR,—From the conference we had yesterday relative to the houses which you have an unexpired lease of, in Cannon Street and Lawrence Pountney Lane, it seems you are desirous of altering the premises in Cannon Street, so as to enable you to carry on your professional engagements with more advantage; and to make which alteration, you inform me, will not cost less

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than 280*l.* or 300*l.* Under this supposition, I wish you to understand that, at the expiration of the lease granted to Mr. Atkinson, I shall not demand a higher rent of you than is at present paid ; and moreover, if at that time it should be considered, upon a fair valuation, that the premises are not worth the rent that they are now let for, I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time. I must, however, beg to observe, it has frequently occurred that Mr. Gell has written to me respecting the difficulty of obtaining the rent at the time usually paid by Mr. Atkinson, though never demanded till some time after it became due. I shall, therefore, under this arrangement between us, expect that all the covenants of Mr. Atkinson's lease will be more strictly attended to. Hoping this will meet your views on the subject, I remain, Sir, your obedient, humble servant,

“WM. ASSHETON, jun.”

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The bill further alleged that the plaintiff, not considering the defendant's letter sufficiently explanatory as to both the houses, he, on the 13th of June, sent to the defendant the following letter :

“CANNON STREET, 13th June, 1823.

“SIR,—I received your letter of the 11th, for which I beg to return you my best thanks. I perceive you only mention alterations in Cannon Street, whereas I stated to you that part of them were to the house at the corner of Lawrence Pountney Lane (the front windows, &c.), both of which houses communicate together in part by an opening through the party wall. You will much oblige me, therefore, by dropping me a line explanatory of this, stating whether you intend to include in the sum mentioned the alterations and improvements of both houses, as well as the renewal of both leases, on the terms you mentioned. I am, Sir, your most obedient,

“R. ASSHETON, Esq.

“R. PRICE.”

In answer to which, the bill stated that the plaintiff received the following letter :

“2, KEPPEL STREET, June 13th, 1823.

“SIR,—The alterations you mentioned to me it was your wish and intention to make, included those both of the house in

Cannon Street and Lawrence Pountney Lane, and of course my intention of granting a lease to you would apply equally to both houses. I am, Sir, your obedient humble servant,

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“WM. ASSHETON, jun.”

After stating the foregoing correspondence, the bill contained this averment: “And the said letters so written by said defendant, Wm. Assheton, were and contained a complete binding agreement on the part of the said defendant for the said renewal of said leases to plaintiff.” *The bill then alleged that the plaintiff, relying on the said agreement being duly performed on the part of the defendant, immediately commenced making the alterations; that he greatly improved the premises, and expended in such alterations and improvements a sum of money exceeding the sum of 900*l.*, and that he thereupon gave to the defendant due notice of such alterations and improvements. That the defendant afterwards refused to renew the leases.

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The defendant, by his answer, admitted the interview between him and the plaintiff stated in the bill, but denied that on that occasion he had promised to grant the plaintiff a new lease for the term of twenty-one years, or any other term. * * He said that he had been advised by his solicitors, that he could not, consistently with his power of leasing, grant a new lease, pursuant to his letter of the 11th of June, 1823. He stated, that neither he nor his solicitors had received any regular notice of the alterations, though he believed the plaintiff had mentioned them to his solicitors. He believed the alterations were slight, and that, so far from being beneficial, they had greatly injured the premises. He denied that the plaintiff had paid all the rent due in respect of the said leases; alleging, on the contrary, that the plaintiff had been very irregular in his payments, and that in July, 1827, the rent was obliged to be raised by distress, and that the rent due at Michaelmas last was still unpaid. He then alleged, that, in 1828, the plaintiff had been discharged under the Insolvent Act; that no mention was made in his schedule of the agreement or contract of which he now sought the *specific performance; but that, on the contrary, he had stated in his schedule, and sworn before the Commissioners, that he had assigned all his interest in the premises to his mother, Margaret Price, for

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certain sums of money, which she had advanced to him at different times, for the purposes of his business. He submitted, that, if the agreement was such as this Court would execute, the assignees under the Insolvent Act ought to be made parties to the suit.

An injunction *nisi* having been obtained to stay the proceedings at law,

Mr. Simpkinson and Mr. Rogers now shewed cause against dissolving the injunction :

* * By the terms of the agreement, the lease was to be renewed or the rent ascertained at a "fair valuation." This expression is not too vague for the Court to act upon in decreeing a specific performance : [*Gaskarth v. Lord Lowther* (1), *Milnes v. Gery* (2).] But, independently of any dispute as to the wording of the agreement, there is in this case evidence of part performance. * * There was clearly an agreement between the parties, and on the strength of it the plaintiff laid out his money. The only thing which can reasonably be contended against the agreement is, that the term for which it is made is not distinctly stated in the written part of it. But in *Hyde v. Skinner* (3), the lessor covenanted to renew the lease, at the request of the lessee, within the term ; the lessee did not request, but his executors requested, *within the term ; and Lord MACCLESFIELD compelled the lessor to renew [for twenty-one years, or for any lesser term, as the plaintiff should elect].

[89] *Mr. James, contra :*

The * * letters contain no promise on the part of the defendant to renew the former lease, but to grant a new lease, to be at a new and reduced rent. All the argument, therefore, derived from the case of *Hyde v. Skinner*, is superfluous. [*Harnett v. Yielding* (4)] decides that equity will not decree specific performance against a party not competent to execute. Now, it is inconsistent with the defendant's power of leasing to grant a lease upon the terms demanded by the plaintiff.

(1) 8 R. R. 310 (12 Ves. 107).

(2) 9 R. R. 307 (14 Ves. 400).

(3) 2 P. Wms. 196. See the

observation of Lord HARDWICKE on this case, 3 Atk. 88.

(4) 9 R. R. 98 (2 Sch. & Lef. 549).

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(THE LORD CHIEF BARON: The defendant says in his letter—"I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time." It may be a question whether taking the rent without reference to the improvements is not inconsistent with the power. If it be worth the tenant's while to pay rent, and also to make improvements, it shews that the rent taken by the landlord is not (according to the terms of the power) the most improved rent.)

Lastly, the insolvency of the plaintiff will prevent his receiving the assistance of a court of equity: *Buckland v. Hall* (1), *Crosbie v. Tooke* (2), *Morgan v. Rhodes* (3). * *

(THE LORD CHIEF BARON: Suppose a man is insolvent, and five or six years afterwards is in affluent circumstances, will that bar him of the relief sought by this bill?)

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It is apprehended it would. But, at all events, the circumstances of this plaintiff in 1834 are not better than they were in 1828. The defendant has several times distrained for rent, and the Michaelmas rent is now due: these are breaches of covenant which will prevent the Court from continuing the injunction, or enforcing the agreement for the new lease: *Thompson v. Guyon* (4).

THE LORD CHIEF BARON:

Nov. 29.

This is a bill filed for the specific performance of an agreement for the renewal of a lease, and the question is, whether the injunction shall be dissolved, and the possession in consequence changed; or whether the injunction shall be continued to the hearing. It appears, on the pleadings, that an agreement for a lease was entered into between the parties, and a certain sum of money was stipulated to be laid out in repairs on the premises; and it appears, from certain letters, that, in consideration of the sum to be laid out, some further lease of the same description should be granted. But then it is

(1) 7 R. R. 1 (8 Ves. 92).

(3) 36 R. R. 345 (1 My. & K. 435).

(2) 36 R. R. 342 (1 My. & K. 431).

(4) 35 R. R. 119 (5 Sim. 65).

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objected, that the injunction must be dissolved, because it does not appear what are to be the terms of the intended lease, particularly the terms in point of duration. Now, in looking to the pleadings, there appears to me to be evidence to shew that the lease agreed to be given was *intended to be a renewed lease; that is, a renewal of the old lease; and, therefore, in point of duration, coinciding with the former lease. The evidence is not conclusive, but there is evidence arising out of the correspondence between the parties. In the first place, it is not probable if a party stipulate to lay out a sum of money, and a lease is to be granted in consideration of such sum, that some understanding should not take place as to the extent and duration of this new interest. But it further appears, that a letter was written by the plaintiff to the defendant, dated the 13th of June, 1823, in which the plaintiff speaks of the intended renewal. An answer is returned to this letter by the defendant, and he does not object that he never intended a renewal, but adverts to other topics. This, therefore, is evidence that it was intended to be a renewed lease; that is to say, a lease of the same duration as the former lease. In addition, reference was continually made to the covenants of the former lease, and Messrs. Baker and Hodgson, the solicitors of the defendant, were requested to take measures for granting a new lease. They do not object to that mode of putting the case, but say that it is premature to enter into the consideration of a new lease until the expiration of the former. I cannot say that this is not evidence leading to the conclusion that it was intended there should be a renewal of the former lease; I cannot, therefore, on this objection, at least, consider myself justified in dissolving the injunction.

But then it is said that the lease agreed to be granted was inconsistent with the power of leasing in the lessor. Now that power, as I find it set out in the answer, is a power to lease for thirty-one years; but the intended lease was only for twenty-one years: therefore, as far as concerns the duration, it was within the terms of the power. But it is said that, according to the power, the best improved rent is to be reserved; while, according to the stipulations in the agreement, the rent was to be fixed by

valuers *at a fair valuation, with reference to the improvements to be made, and the rent was in no event to exceed the rent paid under the former lease. Now, if, at the time of valuation, the new rent should be less than the rent originally stipulated to be paid, then it would not be the best improved rent; but this state of things must depend upon the valuation. This, therefore, is not an argument which can be used in support of the motion for dissolving the injunction. But then another question of some nicety arises, namely, whether, although money was to be laid out by the plaintiff, and the rent to be estimated by the valuers, without reference to the money so to be laid out, that is within the terms of the power? That may be a question of some nicety, to be decided on the hearing of the case, when the terms of the power are before the Court. *Primâ facie*, a rent so reserved is not an improved rent; but here it was stipulated that the improvements should be made by the tenant, in consideration of the new lease. It is difficult, therefore, to say, whether that can be considered as an infringement of the power.

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Then there is this further objection, namely, the insolvency of the plaintiff, or rather his discharge under the Insolvent Debtors' Act; but it appears that his discharge took place seven years ago, and there is nothing in the answer which shews that the debts have not all been discharged. That, therefore, cannot be urged as an objection in this stage of the cause. There are other objections arising out of former breaches of covenants in the existing lease, and neglect and delay in the payment of rent. It is unnecessary, however, to enter into this part of the defence; I have considered it with attention, and am of opinion, that those objections would not justify me in dissolving the injunction.

This cause coming on for hearing, was argued by *Mr. Simpkinson* and *Mr. Rogers*, for the plaintiff; and *Mr. Twiss*, *Mr. James*, and *Mr. Stuart*, for the defendant.

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July 11, 13.
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[The same authorities were cited and arguments put forward as on the former occasion.]

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At the close of the argument, judgment was given by

ALDERSON, B. :

Several points have been made in the course of the argument, upon the question whether or not a specific performance ought to be granted of what is called by the plaintiff in this suit an agreement for renewing a lease. It is not my intention to go through all the objections which have been raised against the plaintiff's claim ; but it seems to me that, upon two of them, I ought not to make a decree for specific performance in this case. In order to lay a foundation for such a decree, some definite agreement must be proved to the satisfaction of the Court. Agreements of this sort are certainly not treated in the same manner in equity as at law, so far as regards the evidence required to shew what is or what is not a breach of them ; as, for instance, in the case where time is not considered of the essence of the contract in equity, it being always considered so at law. But here, as it appears to me, the difficulty is to find out what was the definite agreement between the parties ; and if I do not find upon the pleadings or the evidence some agreement to be executed, I cannot decree a specific performance. Now in this case there is a total failure of any parol evidence. In consequence of the death of one of the witnesses, the plaintiff is not able to give evidence of the arrangement between the parties to which the letter of the 11th of June is supposed to have reference. The Court, therefore, can only look at the letters to ascertain the terms of the agreement.

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Now it appears from the letter of the 11th of June, that there had been a previous conference between the parties, which probably was for the purpose of allowing the lessee *to make alterations in the property which otherwise he would not be permitted to make. The defendant then states that the proposed alterations would cost not less than 280*l.* or 300*l.* ; and then he says, “ under that supposition I wish you to understand, that at the expiration of the lease granted to Mr. Atkinson, I shall not demand a higher rent of you than is at present paid.” The agreement, therefore, upon that point simply is, that if the

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alterations were made by the lessee within the term, the lessor would permit him to occupy the premises afterwards, without demanding additional rent; that he would not, in short, on account of those alterations, raise the market price of a lease of the premises.

The defendant then says, "If at that time it should be considered, upon a fair valuation, that the premises are not worth the rent they now let for, I should not object to grant you a lease at a reduced rent, not taking advantage of such improvements made by you from this time." This is that part of the letter which is supposed to discover an agreement between the parties for a fresh lease; and this I am to suppose to be for twenty-one years, at a reduced rent, to be ascertained from various calculations, which the Court is to make the subject of a decree. It seems to me, that this is infinitely too vague for the Court to act upon. I doubt whether the calculation could be made. The existing lease would not expire till ten years after the letter was written, and all that the defendant appears to say is this—"If you trust me, I will not hurt you; and at the end of the term, I will, under certain circumstances, allow you to remain, and will not raise the rent, if you are a good tenant in the interim." That is not an agreement of which the specific performance can be decreed. If there is not a distinct contract between the parties that one shall do certain acts on his part on condition that the other shall do certain acts on his part, the Court cannot make a decree for specific performance.

Then follows the letter of the plaintiff, dated the 13th of June, and the answer to that letter leaves the understanding between the parties still more vague; at all events, it seems to me to leave the parties exactly where they were. The defendant, in effect, says, "You may safely lay out your money in the premises; you are in the hands of a safe man, and I shall not disturb you if you conduct yourself as a good tenant in the meantime." In fact, the parties made their agreement without reference to all the circumstances that might happen: the agreement also refers to future circumstances. If it be considered that their real intention was, that the renewal of the lease should depend upon

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the subsequent conduct of Price, of which Assheton was to be the judge, the arrangement between them becomes more intelligible. But how is the Court to execute an agreement in which no time and no rent are stipulated for ; but on the contrary, where time and rent are left to future regulation ?

The other objection which has been raised to the plaintiff's claim is his insolvency. It is admitted to be discretionary with the Court, whether it will accede to an application of this sort made by an insolvent debtor ; and that the Court will not compel a landlord to take an insolvent party as his lessee. It appears to me, that the insolvency of the plaintiff is well made out, and that the copies of the documents which have been produced, are sufficient evidence of that fact under the 19th section of the statute, without reference to the 76th. The bill must be

Dismissed, with costs.

1834.
Nov. 27.
Dec. 1, 23.

[103]

SPARKE v. MONTRIOU.

(1 Y. & C. 103—110.)

Where a defendant appears to be a bare trustee for the plaintiff, and offers no explanation to the contrary, the Court will compel the production of deeds and documents admitted, by his answer, to be in his possession.

The mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production, if in other respects such compulsion would be inequitable.

IN this case two motions were made for the production of deeds and papers admitted by the answers of the defendants Montriau and Carvick respectively. The application in each case was, that the defendant may be ordered to leave in the hands of his clerk in Court the several deeds, documents, papers, and writings, admitted by his several answers filed in this cause, or the schedules thereto respectively, to be in his possession, custody, or power, and particularly certain indentures, &c. ; and that the said several deeds, &c. may be produced at the hearing of this cause, or that the said defendant may be ordered to produce the said several deeds, &c. to the said plaintiff's

solicitors, and to the examiner, for the purpose of proving the same, and at the hearing of this cause.

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*
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According to the statement in the bill, Richard Moore *was indebted to Peter Firmin in the sum of 1,200*l.*, secured by a judgment entered up in Trinity Term, 1806. In 1810, Moore mortgaged certain real estates to Ezekiel Sparke, for 1,200*l.* Afterwards, Moore contracted to sell other estates, of very considerable extent and value, to W. L. Ogden, for which Ogden was to pay a large deposit. Ogden declining to pay the deposit without some security, Sparke, who was a friend of Moore, assigned his mortgage to Ogden for that purpose, under an agreement that when the purchase was completed, the security should be re-assigned. The deposit was accordingly paid. Ogden afterwards granted an annuity to one Allen, and assigned Sparke's mortgage to secure the annuity. Allen assigned to the defendant Carvick. In the meantime Sparke had obtained an assignment of Firmin's judgment. Before the completion of the contract for the sale of the real property, Ogden died, and all the interest of Moore in the premises was conveyed to the defendant Montriou upon trust, to carry the contract into execution with Ogden's representatives, or abandon it upon their receiving the difference of the purchase-money. Montriou entered into an agreement with Ogden's representatives to rescind the contract, which was done. Moore and Sparke both died. Moore's real estates were purchased by Hart Logan. The bill was filed by the widow and personal representative of Sparke against the defendants Montriou and Carvick, Willoughby Moore, the son and heir-at-law of Moore, and Hart Logan; praying for the benefit of the judgment, and of Sparke's mortgage deed; that Carvick's annuity might be paid off out of the purchase-money due from Hart Logan; that the lands covered with Sparke's mortgage might be reconveyed as a security for his mortgage money; for an account of what was due to him for principal and interest; and payment of his debt.

Mr. Wakefield now moved for the production of the *deeds by the defendant Montriou, observing that Montriou was a trustee for the plaintiff. The application was made in the alternative;

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either that the deeds might be produced at the hearing, or that they might be produced before the examiner, for the purpose of being proved. Proof of the deeds was what the plaintiff mainly required.

Mr. O. Anderdon, contra :

[The deeds are the title deeds of the defendant himself.] Suppose one party states certain deeds as part of his own case, is the other party entitled to their production upon the mere allegation that the former party is a trustee?

Mr. Wakefield, in reply :

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Moore was a trustee for Sparke to the extent of Sparke's mortgage; and Moore's interest being now vested in Montriou, the latter is a trustee for the plaintiff. * * It depends on whether the deeds are by reference incorporated with the answer, and made part of it. Here the deeds are sufficiently incorporated with the answer. Those of the 11th and 12th February, 1811, the conveyance to Ogden, are set out and referred to in these terms: "As by the said indentures, reference being thereunto had, will more fully and at large appear." The conveyance to Montriou, and other deeds, are comprised in the schedule; and the schedule is expressly referred to in the answer. The answers shew that the plaintiff has an interest in those deeds; and the Court will not presume that the defendant has inserted in his schedule deeds in which the plaintiff has no interest. * * *

The LORD CHIEF BARON was of opinion that the defendant had by his reference to the deeds made them part of his answer, and that he was *primâ facie* bound to produce them. There might be reasons for not producing them; but if so, it was incumbent on the defendant to shew what those reasons were.

The order made was that the defendant Montriou should furnish the plaintiff's solicitors with the names, descriptions, and residences, of the attesting witnesses to the deeds, and that the deeds should be produced before the examiner to be proved, and at the hearing of the cause.

* * * * *

EX PARTE NORTHWICK, IN THE MATTER OF THE
LONDON AND BIRMINGHAM RAILWAY
COMPANY (1).

1834.
Dec. 23.
[166]

(1 Y. & C. 166—168.)

Where an Act of Parliament establishing a railway company, authorized the Company to purchase lands of corporations, tenants for life, &c., and directed that the purchase-money should be applied in the redemption of the land-tax upon other parts of the property unsold: Held, that a tenant for life, who had redeemed the land-tax before the passing of the Act, might reimburse himself out of the proceeds of the lands purchased of him by the Company.

The costs of an application to the Court under such an Act of Parliament, to have the purchase-money applied in the redemption of the land-tax, will be allowed against the Company, although the Act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses.

THE petitioner, Lord Northwick, was tenant for life, under certain settlements, of considerable estates in the parish of Harrow. In the years 1806, 1808, and 1812, he redeemed the land-tax upon several portions of these estates, and the aggregate amount of the several sums paid for the redemption was 1,124*l.* 16*s.* 1*d.*

By the 3 Will. IV. c. xxxvi., the London and Birmingham Railway Company are empowered to purchase lands for that undertaking, of corporations, tenants for life, tenants in tail, &c. The word "lands," by the terms of the Act, includes "tenements and hereditaments."

Under the 40th section of the Act, the money to be paid for the purchase of any land of any corporation, tenant for life, &c., shall, if it exceed 200*l.*, be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, according to the provisions of the stat. 1 Geo. IV. c. 35; there to remain until the same shall, by order made upon petition in the Court of Exchequer, be applied either in the purchase or redemption of the land-tax, or in the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled to the same uses; or until

(1) *In re Bethlem Hospital* (1875) 17 Ch. D. 378; 44 L. T. 52. As to L. R. 19 Eq. 457, 44 L. J. Ch. 406; costs, see now the Jud. Act, 1890, s. 5. *In re St. Katharine Hospital* (1881) —O. A. S.

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the same shall by a like order be laid out in the purchase of other lands to be settled to the like uses, as the lands which shall be so purchased stood settled or limited.

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The 41st section enacts, that where, by reason of any disability or incapacity of any party entitled to the lands to be taken by the Company, the purchase-money shall be required to be paid into the Bank of England, to be applied in the purchase of other lands to be settled to the like uses, it shall be lawful for the Court to order the *expenses of such purchases, together with the necessary costs and charges of obtaining such order, to be paid by the Company out of the monies to be received by virtue of the Act.

The petition stated that the petitioner had contracted with the Company for the sale to them of some parts, and the enfranchisement of other parts, of the settled lands; and that in pursuance of those contracts, and by virtue of the Act, the Company had paid into the Bank of England two sums, amounting together to 1,776*l.* 17*s.* 6*d.*, which were then standing in the name of the Accountant-General. The petition likewise stated that the sum of 1,124*l.* 16*s.* 1*d.*, so paid for the redemption of the land-tax, was advanced by the petitioner out of his own proper monies; and he submitted that the same having been expended for the benefit of the estates, he was entitled to be repaid the amount.

The petition prayed, that, out of the said sum of 1,776*l.* 17*s.* 6*d.*, the Accountant-General might be directed to pay to the petitioner the sum of 1,124*l.* 16*s.* 1*d.*, in repayment of the sums advanced and paid by him for the redemption of land-tax on parts of the said settled estates, as aforesaid; that he might be directed to pay the residue to the Receiver-General, for the purpose of redeeming the land-tax on other parts of the said estates; and that it might be referred to the Master to tax the petitioner his costs, charges, and expenses of this application, and incidental thereto; and that such costs, when taxed, might be paid to the petitioner by the said Company, &c.

Mr. Lorat, for the petition.

Mr. Younge, for the Company, expressed a doubt whether the petitioner could claim to be repaid what he had laid out in

the redemption of the land-tax before the passing of the Act. If he could, then another question was, whether, under the terms of the Act, the petitioner was entitled to *the costs of this application? According to the Act, costs were only to be allowed when the money was to be laid out in the purchase of lands to be settled to the like uses. Here the residue of the money, after repayment to the petitioner, was to be applied to redeem the land-tax on other parts of the estates.

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NORTHWICK.

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The LORD CHIEF BARON said he thought the application came within the spirit of the Act, and granted the petition.

DEARE v. THE ATTORNEY-GENERAL.

(1 Y. & C. 197—210.)

1835.

Jan. 23, 24, 29.

Feb. 10.

[197]

An information having been filed by the *Attorney-General* against A., for an account of his dealings and transactions with the Government as an army agent, A. pleaded in bar of the information a settled account, by means of certain clearing warrants. This plea having been overruled, A. filed his cross bill against the *Attorney-General* and the Secretary at War, alleging that the clearing warrants have been invariably treated as a settled account, but that he had only recently, and since the plea, been acquainted with the proceedings at the War Office, by which the clearing warrants were rendered conclusive. The bill then charging that the defendants had divers papers, &c., by which the truth of the several matters alleged would appear, prayed for a discovery—for a declaration that the clearing warrants amounted to a settled account, and for a perpetual quietus from all proceedings by the defendants. To this bill the defendants having demurred, on the ground that they were public officers, and also for want of equity, the demurrer was overruled.

THE plaintiff's father, and afterwards the plaintiff himself and his father, as partners, were, many years previously to 1797, agents to his Majesty's regiments or troops, called the Dunbarton Fencible Cavalry, and the Lanark Fencible Cavalry; and in such character received various large sums of money from the Government for the pay of those troops.

In the year 1824 an information was filed by the *Attorney-General* against the plaintiff, under the provisions of the 45 Geo. III. c. 58, charging that parts of such sums of money, to a considerable amount, had not been paid or accounted for by the plaintiff or his father to the officers of the above-mentioned

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troops, and that the plaintiff was a debtor to his Majesty for the balance due in respect thereof; that no settlement had ever been come to between the plaintiff and his father; and the persons duly authorized in that behalf by his Majesty, and that the plaintiff had in his custody divers books of account, papers, writings, and documents, relative to the said agencies, by which it would appear what sums of money had been so received, and what remained unaccounted for, &c., and praying for a full discovery of the matters aforesaid, to enable his Majesty to sue for and recover the several sums of money and balances remaining in the plaintiff's hands, as the surviving partner and personal representative of his late father.

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To this information the plaintiff pleaded in bar, that *all the said accounts were finally settled by virtue of certain clearing warrants, which were made out and signed by the Secretary at War, and countersigned by the Lords of the Treasury for the time being, and issued by the proper authorities to the plaintiff. But this plea was overruled.

The plaintiff then filed the present bill, which was in the nature of a cross bill to the information against the *Attorney-General* and Mr. Ellice, then Secretary at War, stating the usage of the War Office as to the issuing of clearing warrants, which, as he alleged, depended on the strict investigation of the accounts, testified by vouchers, &c., delivered to the War Office; stating also nine different accounts which had been settled between the plaintiff's father and himself and the Government, on the footing of this usage; and insisting, that previous to the year 1811, a clearing warrant had always been considered by all Secretaries at War, and other Government officers employed on military accounts, army agents, colonels of regiments, and all other persons, as a complete quietus to the agent; and that no other settlement was ever asked for or considered to be necessary.

The bill then alleged, that though the plaintiff always knew that a clearing warrant, after the same had been adjusted and fully carried into execution, was, with reference to all transactions of a date prior to 1811, a final and settled account, and invariably treated as such; yet the plaintiff did not until very recently become acquainted with the whole of the proceedings at

the War Office, Pay Office, and elsewhere, whereby such clearing warrant, when fully carried into execution, became a full and settled account for the regiments and corps, and for the period and service to which the same referred; and not till long after it was in the power of the plaintiff in any manner effectually to avail himself of his knowledge of such proceedings in his defence to the information aforesaid. *That the Right Honourable Edward Ellice is now his Majesty's Secretary at War, and as such Secretary at War hath in his custody or power the whole of the general states or accounts, vouchers or writings, so delivered into the War Office by the plaintiff, or by the plaintiff and his father as aforesaid; and also the several clearing and other warrants and papers and writings relating thereto respectively, by which, and by other books and documents now or lately in the custody or power of the said Secretary at War, when produced, the truth of the several matters aforesaid would appear; and which the said defendants ought to produce, but which they refuse to produce. That the plaintiff cannot safely proceed in his defence to the said information of his Majesty's *Attorney-General* without such production, and a discovery of the whole of the matters and things connected therewith herein respectively set forth and inquired after.

The bill prayed that the defendants may set forth a proper list or schedule of all such accounts, &c., delivered by the plaintiff and his late father, or either of them, into the War Office as such agents, from May, 1794, to December, 1797. And also a list or schedule of all such clearing and other warrants, books or book accounts, memorandums and writings, which now are, or ever were, in the custody, possession, or power of the defendants, or of the Secretary at War for the time being, relating to the accounts of the said two regiments and corps, and for the period aforesaid, and otherwise relating to any of the matters aforesaid; and also a list of all writings and papers which were prepared at the War Office or elsewhere, under the power or control of the Secretary at War for the time being, or other officer of the Government, relating to the matters aforesaid, or some and which of them, distinguishing which of the same are now in the possession, custody, or power of the said

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^{c.}
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[*200]

defendants, or either of them, and may leave the same in the hands of their clerk in Court *for the usual purposes, and may set forth what hath become of such of them as are not now in the possession, custody, or power of the said defendants or either of them. And that the said defendants may respectively make a full and true disclosure and discovery of the several matters and things hereinbefore stated and charged. And that it may be declared by this Court that the said clearing warrants for the service and period to which the same extend, after having been carried into execution in manner herein mentioned, amount to such full and final settled account as herein is mentioned ; and that neither the same accounts, nor any of them, ought now to be disturbed or opened. And, in order that the plaintiff may be for ever quieted respecting the said agency accounts, for the period and service herein mentioned, that Sir John Campbell, his Majesty's *Attorney-General*, and the said Secretary at War, and their successors respectively, may be perpetually enjoined, by the order and injunction of this Court, from prosecuting the said information, or from instituting or prosecuting, or causing to be instituted, any other legal proceedings in this Court or otherwise, against the plaintiff, touching the same ; and for general relief.

To this bill the defendants [demurred on the ground that they were sued as public officers and for want of equity.

[201]

Mr. Rolfe and *Mr. Wray*, for the demurrers.

[202]

Mr. Simpkinson and *Mr. Miller*, for the bill.

[204]

Mr. Rolfe, in reply.]

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The LORD CHIEF BARON [after making some observations upon the mode of procedure by cross bill, said :¹ But, assuming the facts to be true, as stated in this bill, I cannot hesitate to say that they amount to a clear defence to the particular suit instituted by the *Attorney-General* against him ; and, if that be so, surely he is entitled to this sort of relief, namely, that he may have the *benefit of the discovery for the purpose of adducing those facts before the Court in a specific and distinct form, when both the bills come on together.

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A great deal of learning has been gone into for the purpose of shewing that such a bill may be filed against the *Attorney-General*. I make some remarks upon it, that I may not be supposed to have overlooked any part of the argument. I apprehend that the Crown always appears by the *Attorney-General* in a court of justice, especially in a court of equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the *Attorney-General*, or of making him a party to a bill, where the interest of the Crown is concerned. I am not prepared to say that a bill of discovery has ever been filed, or could upon principle be sustained against the *Attorney-General* for a discovery of matters that can be neither in his personal nor official knowledge; or that the Crown would be bound, through the medium of the *Attorney-General*, to make that discovery. At the same time it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a court of justice, where any real point of difficulty that requires judicial decision has occurred. Hence there are a great variety of cases where bills of this sort have been filed, in which the *Attorney-General* has been a party; and one case has been referred to, where it appears that the *Attorney-General* did set forth a full answer (1). There the Treasury desired that the question might be brought before the judicial consideration of some court of justice; and it was very clear, when once the Court thought that it ought to have jurisdiction over the subject-matter, that it did not become the *Attorney-General* to urge any form in opposition to *it: otherwise, I think it would be a difficult thing to say that a mere bill of discovery might be filed against the *Attorney-General*, instead of putting the party to his petition of right, which is the proper remedy against the Crown, where he claims a specific relief against the Crown.

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[After referring to the peculiar jurisdiction of the Court of Exchequer over auditors of public accounts, his Lordship concluded the judgment by saying:]

We come back, therefore, to the short ground on which I decide this case; that there does appear to me to be on the face

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(1) *Crawford v. Attorney-General*, 7 Price, 1.

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of this bill a ground of relief on which the party is entitled, which he alleges he could not obtain by the pleadings in the original cause, and therefore he asks for a discovery. What the effect may be of an answer I do not pretend to say; but, in case of any doubt whether a demurrer can be sustained or not, the safest course is to overrule the demurrer; because the party will have the same benefit upon the answer that he could have had upon the bill and the demurrer. Therefore, however much shaken I have been—which I confess I was—by the argument for the defendants; nevertheless I come back to the original impression which I had formed in the outset, that there was sufficient in this case to call upon me to overrule the demurrer. I am the more inclined to act upon that opinion, though I do not pretend to entertain a very great confidence in it, from the conviction that it will be no prejudice to the parties if I adopt that course; whereas it might be very much otherwise if I were to allow the demurrer. Upon these grounds, therefore, I think it right to

Overrule the demurrer.

1835.
Jan. 15, 28.
March 2.

BELLWOOD v. WETHERELL (1).

(1 Y. & C. 211—220; S. C. 4 L. J. (N. S.) Ex. Eq. 23.)

Consideration of the circumstances under which and the extent to which a defendant may claim discovery of a plaintiff's title.

[211]

THE defendant in this suit, as lay impropiator of the rectory of Osmotherley, in the county of York, in Trinity Term, 1833, filed his bill against the present plaintiffs and others, for an account of tithes for lands in their respective occupations within the said parish.

The present was a cross bill filed for the purpose of obtaining a discovery of the defendant's title. It alleged that the defendant was only a portionist of some tithes arising upon certain lands within the parish of Osmotherley, and not the impropriate rector of such parish. It likewise alleged that the first conveyance under which the defendant claimed title, and which the bill charged to be in his possession, and which bore date, &c., did

(1) Cp. *Bidder v. Bridges* (1885) 29 Ch. Div. 29, 54 L. J. Ch. 798, 52 L. T. 455.

not contain certain lands for which he claimed tithes, although in subsequent conveyances, which were likewise in his possession, those lands had been preserved with a view to give the persons claiming under the same an apparent or valuable title to the said rectory.

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The bill contained charges, on which the following inquiry was founded: "Whether the said Benjamin John Wetherell is in any and what manner, or under any and what deeds or deed, entitled to the tithes which he is seeking to recover by his said bill against the plaintiffs. And that the said Benjamin John Wetherell may discover and set forth what tithes within the said parish of Osmotherley he is seised of or entitled to, and how and in what manner and in what capacity he is seised of or entitled to the same, and under what deeds or deed, and the dates or date of such deeds or deed, particularly the dates or date of the first deeds or deed, under which he alleges the said rectory was conveyed to the person or persons under whom he claims such rectory."

The defendant by his answer denied that he was only a *portionist. He said that one John Weighill had formerly the said rectory duly conveyed to him, or by other good and lawful means became the lay impropriator thereof. That he, the defendant, claimed to be entitled to all the tithes, both great and small, within the township of Osmotherley, excepting from such lands the tithes whereof had been sold off, but which lands were not in the occupation of any of the plaintiffs. That he, the defendant, was the impropriate rector of the said parish, and that he derived title to the tithes aforesaid under the said John Weighill. With respect to the foregoing inquiry, his answer was as follows: "That he is in manner hereinbefore, and in his said former answer mentioned, entitled to the tithes which he is seeking to recover by his said bills. And he insists and submits that said plaintiffs are not entitled to be informed under what deeds or deed, or the dates or date of such deeds or deed, particularly the dates or date of the first deeds or deed under which he alleges the said rectory was conveyed to the person or persons under whom this defendant claims the said rectory."

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The plaintiff took exceptions to the answer for insufficiency.

BELLWOOD *Mr. Barber and Mr. Bayley, for the exceptions [cited*
v. Bowman v. Lygon (1), Metcalfe v. Harvey (2), and Moodalay v.
 WETHERELL. *The East India Company (3)]*.

[213] *Mr. G. Richards, contra :*

The plaintiff is not entitled to the production of these deeds, and the principle is the same either on a cross bill or an original bill. Where the defendant admits that he has deeds which make out the plaintiff's title, the Court will order them to be produced. But the Court will not order their production in this case, for the defendant has admitted deeds which relate to the rector's title only. * * *

[214] (THE LORD CHIEF BARON : * * Is it not essential that the defendants should know whether the plaintiff is really rector, in order to be guarded against a suit by another person ?) * * *

Mr. Barber, in reply. * * *

[215] *Mr. G. Richards, for the defendant, referred to Bolton v. Corporation of Liverpool (4).*

March 2. THE LORD CHIEF BARON :

These are exceptions to the answer to a cross bill filed against a lay rector, the rector having filed his original bill for an account of tithes. The defendant in the original suit puts the plaintiff's title in issue in his answer, and then files his cross bill against the plaintiff for a discovery of his title, disputing his title as rector, alleging that he is only a portionist, and not the rector generally; he does not, however, suggest that any body else is rector, or that any body else is entitled. These exceptions are taken to the answer, because the rector does not set forth his title in manner required by the bill. The question, therefore, is this, whether the rector under the circumstances is bound to disclose the evidence of his title? Upon looking at the cases,

(1) 1 Anstr. 1. See judgment,
post, p. 245.

(2) 1 Ves. Sen. 249.

(3) 1 Br. C. C. 468.

(4) 36 R. R. 251 (3 Sim. 467; 1
 My. & K. 88).

some of them appear extremely embarrassed and contradictory, and no steady principle is adopted in them. The case which appears at first to be most in point, is that of *Bowman v. Lygon* (1), but it does not furnish a precise decision on the subject. That was a bill filed by a rector for tithes; the rector's title was put in issue, and a cross bill was filed, seeking a discovery of the rector's title, and whether he had received any agistment tithe. The demurrer was to both these points. The principle was there recognised, that, as a general proposition, a man should not be obliged to discover his title; but the same distinction was attempted to be established in that case as in the present; one of the counsel arguing, that where a person *is defendant to an original bill, he is entitled in all cases to a discovery of the plaintiff's title. I cannot accede to that. The judgment in that case was no doubt correct, because the demurrer covered too much. Mr. Baron THOMPSON, a most consummate Judge both in law and in equity, proceeded with his usual caution on that occasion, and avoided coming to any decision on a point not in question. He held the demurrer bad, for the reason I have stated, but gave no opinion upon the other point; a reserve which would have been wholly unnecessary, if he had thought it perfectly clear and indisputable. Then Lord Chief Baron EYRE, a person of great accuracy, though not always so cautious in delivering his opinions as Mr. Baron THOMPSON, throws out an observation which qualifies the general proposition. He seems to consider that nothing but some pressing matter arising in the particular suit would justify the discovery. He says it is difficult to draw a line in what cases discovery ought to be granted, as where the tenant is fearful of being harassed by different claimants of the impropriation. Now the obvious line to be drawn is this—that though in general the defendant has no right to a discovery of the plaintiff's title, yet in certain cases he will be entitled to a discovery of the nature, though not of the evidence, of that title. Thus, where a party files a bill as rector, the defendant may file a cross bill, to see whether the plaintiff in the original suit is entitled to have that which he admits may be due to somebody. The defendant may allege that some other

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person is entitled, and in such case he may file his bill of interpleader. If he does not go that length, he may suggest that he has had notice that some other person is entitled paramount to the plaintiff, or that the plaintiff has parted with his right to the tithes; and in such case, though there is no ground whatever to make the party disclose the evidence of his title, still there is ground to call on the party to discover the nature of his title, so that the defendant *shall not be harassed a second time. That

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would apply to several cases: as, for instance, if the defendant to an original suit had established a modus, and it then turned out that the plaintiff had parted with his interest, a person claiming by a paramount title might say that he was not bound by that decision. It is clear that in such case the defendant would have a claim to discovery of the nature of the plaintiff's title, in order to protect himself in that particular payment.

The distinction to be taken in cases of this nature was recognised in those cases of *Glegg v. Legh* (1), and *Cherry v. Legh* (2), in the House of Lords. In the former case, the plaintiff filed his bill as rector for the recovery of tithes. The answer denied the plaintiff's title as rector, and then a cross bill was filed; and the cross bill must have been suggested by that which appeared in the answer. At that time the rectory was vested in two trustees of a term for securing certain annuities, and also in a mortgagee. Now this bill was filed in 1817, and the cross bill was filed the following year; and I find by the report in *Cherry v. Legh*, that the bill against Cherry was not filed till 1820, which was after the answer was put in to the bill filed by Glegg and the other parties; and in this last bill, Egerton and Tatton, the trustees of the term, were made plaintiffs. That was not so in the original bill filed by Glegg. When this last case came to be tried in the Exchequer, two defences were set up, one of which was a denial of the plaintiff's title as rector; and this Court decreed, notwithstanding the trustees were in possession of the term for securing the incumbancers, and notwithstanding the mortgagee had the legal title; yet, as all the annuities had been paid up to the time when the bill was filed; and as the mortgagee had been paid all

(1) 1 Bligh (N. S.) 302.

(2) *Id.* 306.

his interest ; *that was a sufficient protection to the defendant, because he could not be called on again by the trustees or mortgagees, and, therefore, he was bound to account. That decree was confirmed by the House of Lords, and the very opinion of Lord ELDON on the hearing of the appeal, shews what was the object of the discovery claimed by the cross bill ; and it appears clear that he thought there was a distinction to be drawn in these cases, and that it does not follow that if a plaintiff files a bill claiming tithes, that gives the defendant the right to file a bill to obtain from the plaintiff the evidence of his title.

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It was said, indeed, by the counsel who supported the exceptions, that where a party is brought into equity as a defendant, he is in a different situation from a party seeking discovery as a plaintiff, and that he has a right to file a cross bill to obtain the discovery necessary for his defence ; and in support of that position, the case is adduced where a defendant attacked by an ejectment files a bill of discovery. But the observation to be made as to that is simply this—where a party is in possession of an estate, and a perfect stranger comes to turn him out, alleging himself to be the person entitled, it is but reasonable that the party so attacked should have an opportunity of knowing the plaintiff's case ; so far as whether he claims as heir-at-law—whether he claims under a devise—or whether he alleges any imperfections in the defendant's title deeds. There the defendant is taken by surprise, and therefore I can easily understand in such a case why, not the evidence, but the nature of the title, should be disclosed. But in cases of recent possession, where parties well know the nature of each other's titles, there is no ground to compel any such discovery as that which is here required. That appears to me to be an answer to the argument derived from the cases of ejectment.

* * * * *

There is, undoubtedly, a recent case of *Bolton v. The Corporation of Liverpool* (1), where, upon a bill filed for the discovery of documents affecting the right of the corporation to demand toll, the Court of Chancery ordered the defendants to produce certain

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(1) 36 R. R. 251 (3 Sim. 467 ; 1 My. & K. 88).

BELLWOOD v. WETHERELL. cases which had been laid before counsel relating to the subject in dispute, those cases not having been prepared with reference to the existing proceedings. I confess I do not think that decision was warranted by the cases which were made the foundation of it. I should have decided it differently, and should not have allowed the production of those documents; at the same time, where a corporation claims a toll to be due from the inhabitants of a town, then I think it would be both expedient and just, not that the evidence of their title, but that the nature of their claim, should be discovered.

[220] The plaintiff in this suit does not suggest upon his bill any doubt whether he may not be put to additional expense, and be harassed again by some person claiming a paramount title to the rectory. He simply says, that the defendant is not rector; and that brings it to the naked question, shall he be allowed to call on the defendant to produce a deed, not because it makes out his own case—not to defend himself—but to expose the plaintiff to all the dangers of a discovery? The possession of the rectory, without any adverse claimant, is *primâ facie* evidence of his title; and if in any document to be so produced, a flaw should happen to be found, it would be a summary means to deprive the rector of his right, if that deed were exposed in a court of equity, where other persons might take advantage of the defect. At law, the rector must prove his title, as in any other case, and the defendant might take advantage of any imperfection; but to allow such an application as the present, would be to enable the defendant in a tithe suit in every case, to call on the plaintiff to produce the particulars of his title. The case by which the general rule is entrenched upon, and which forms an exception to the rule, is where it is expedient that the defendant should be protected from any adverse right set up by a paramount claimant, and from agitating the matter over again.

Exceptions overruled.

LORD *v.* STEPHENS.

(1 Y. & C. 222—231.)

1835.
Jan. 29.

[222]

In an agreement for the purchase of an estate, one of the stipulations was, that the vendor should be tenant from year to year to the purchaser: Held, that the inability of the vendor to perform this stipulation by reason of embarrassments of which the purchaser must have had some notice, was no bar to the specific performance of the contract.

A stipulation to give such a title as shall be satisfactory to the purchaser, does not authorize the purchaser to make any other than the usual objections to the title (1).

Deterioration of the estate, arising from delay in completing the purchase, is not a ground for rescinding the contract, but may be the subject of an allowance to the purchaser.

RICHARD LORD, the father of the plaintiff, being seised in fee of various freehold estates, by indentures of lease and release, dated the 28th and 29th days of May, 1822, conveyed a farm of 98 acres to the defendant by way of mortgage, for securing the sum of 4,000*l.* and interest. By indentures of lease and release, dated the 16th and 17th days of May, 1827, he conveyed another farm, containing 120 acres, to Booth Hodgetts, by way of mortgage, for securing the sum of 8,500*l.* and interest.

Upon the death of Richard Lord the father, in December, 1831, the equity of redemption in all the mortgaged premises became vested in the plaintiff Richard Lord, the son.

In February, 1832, the defendant being desirous of purchasing of the plaintiff the farm comprising the 120 acres, and of deducting from the purchase money what was already due to him on mortgage, entered into an agreement with the plaintiff for the purchase, and paid 100*l.* as a deposit. The agreement was as follows:

“Memorandum of an agreement made this 14th day of February, 1832, between Richard Lord, of Barly, in the county of Leicester, farmer, of the one part, and the Rev. Richard Stephens, of Belgrave, in the county of Leicester, clerk, of the other part. The said Richard Lord doth hereby agree to sell to the said Richard Stephens, and the said Richard Stephens doth hereby agree to purchase at the rate and price of 60*l.* per acre, all &c., containing 120 acres or thereabouts, now in the

(1) *Hussey v. Horne-Payne* (1879) 4 App. Cas. 311, 48 L. J. Ch. 846, 41 L. T. 1.

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occupation of the said Richard Lord, free from all tithes and quit rents, but subject &c. And it is hereby declared and agreed that the said Richard Lord shall, at his own expense, make out a good and marketable title to the said premises; and the said Richard Stephens shall be at the expense of his *own conveyances. That the purchase shall be completed on the 1st day of July next, when the said Richard Stephens shall pay the remainder of his purchase money, and the said Richard Lord shall execute a proper conveyance, &c. That nothing herein shall prejudice the mortgage between the said Richard Stephens and Richard Lord, the late father of the said Richard Lord, or the principal and interest and monies thereby secured, except that the said Richard Stephens shall be at liberty to deduct the amount thereof from the said purchase money. That the said Richard Lord, party hereto, shall, after the completion of this purchase, take and be permitted to rent and occupy the said premises, at a sum or amount equal to 4l. per cent. per annum, and interest, on the purchase money to be paid for the said premises, as tenant from year to year; and a proper lease or agreement be granted and accepted thereof, with the usual covenants in farming leases or occupations accordingly. And lastly, that the costs of this agreement shall be paid equally between the said parties; and that in case the title shall not be satisfactory to the said Richard Stephens, his heirs or assigns, or his or their counsel, these presents shall be void to all intents and purposes."

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In August, 1832, a fiat in bankruptcy issued against the plaintiff, but was annulled by an order dated the 9th February, 1833. In January, 1833, the defendant caused a formal notice to be served on the plaintiff, stating, that in consequence of the delay which had taken place in making out the title to the premises contained in the written contract, under which it was agreed that the purchase should be completed on the 1st day of July then following; and in consequence and by reason of the bankruptcy or reputed bankruptcy of the plaintiff, whereby he was rendered unable and unfit to accept the defendant's lease, or become a tenant of the said farm to the defendant, *pursuant to the said contract, and for other reasons, he the defendant

thereby gave the plaintiff notice that he should abandon and give up, and did thereby abandon and give up, the said purchase and the said contract, except as to the deposit of 100*l.*, which he thereby required to be returned, together with interest, or that he should take legal proceedings to recover the same.

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STEPHENS.

The bill stating the foregoing facts, and charging that the delay had arisen on the part of the defendant, and that the same solicitor acted both for the plaintiff and the defendant until the bankruptcy, prayed a specific performance of the contract, and that the defendant might be restrained from proceeding against the plaintiff by ejectment, or for the deposit.

The defendant by his answer admitted all the material allegations of the bill, but said, that shortly after the date of the said contract a bill had been filed against the plaintiff, and also against Hodgetts, the mortgagee of the 120 acres, and against two other incumbrancers, praying a foreclosure in respect of a mortgage of the premises which had been executed by the plaintiff's father in July, 1830, for securing 1,100*l.*, which suit was still pending in the Court of Chancery; that another foreclosure suit was also pending, which had been instituted by Hodgetts; that after the contract was entered into, the plaintiff fell into embarrassed circumstances, whereby he became incapable of properly occupying the said lands as tenant thereof, according to the terms of the agreement; and that the plaintiff had since the agreement been in possession of the premises, and had by improper modes of husbandry and farming greatly injured and deteriorated the said lands, and particularly the pasture lands thereof. He submitted, that, under these circumstances, he was justified in refusing to complete the contract, and that it was not his fault that it was not completed at the time agreed upon.

The defendant did not allege by his answer, nor did it appear from the evidence, that he was ignorant of the mortgage of 1830 at the time of his contract with the plaintiff.

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On the part of the plaintiff, evidence was read to shew that the lands were not mismanaged after the contract was entered into. It was proved by one of the witnesses, that in September, 1833, there was a meeting of the mortgagees, at which the

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defendant and his solicitor were present; that on that occasion a discussion arose connected with the contract for the purchase by the defendant; and that the defendant then claimed to have the sum of 700*l.* deducted out of his purchase money for injury and dilapidations accruing to the premises since the contract, which the deponent on behalf of the plaintiff thought unreasonable, and proposed to have left to arbitration; but that the defendant and his solicitor declined such proposal.

On the part of the defendant, it was given in evidence that, in 1832, the plaintiff mowed about 67 acres of old pasture land; and that, in the following year, he mowed nearly the whole of the lands, it being a grass farm; that he carried off the produce without properly grazing the lands, or manuring them, &c., and that he neglected to repair the outbuildings. It was likewise proved that several distresses had been made upon the premises by the mortgagees, and, amongst them, by the defendant himself, for arrears of interest on the 4,000*l.*

Mr. Treslove and Mr. Koe, for the plaintiff:

[226] * * Deterioration, however, of the property during the time required for completing the purchase is not a ground for rescinding the contract, though it may be the subject of an allowance to the purchaser: *Ferguson v. Tadman* (1). * * *

Mr. Boteler and Mr. Blunt, for the defendant:

First, the agreement must be performed, if at all, in the entirety. It was a substantial part of the agreement that the defendant should look to the plaintiff as his tenant, at a rent fixed by the terms of the agreement. The plaintiff being unable to perform this condition properly, the agreement is at an end.

(THE LORD CHIEF BARON: The tenancy was determinable at six months' notice.)

[*227] * * Secondly, the agreement does not contain the usual stipulation that the plaintiff shall make a good title, but that, in case the title shall not be satisfactory to the defendant, the agreement shall be void. Therefore, if *the objections raised by the

defendant are fair and reasonable, the Court will not enforce the contract against him. * * *

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Mr. Treslove, in reply :

* * The contract clearly does not mean that the defendant shall be at liberty to take an absurd or capricious objection to the title.

THE LORD CHIEF BARON :

The two objections which have been raised on the part of the defendant appear to me to amount to nothing. The defendant clearly knew that the plaintiff was not affluent; he himself claimed interest for the 4,000*l.*; he therefore knew that the plaintiff could not pay the interest of that mortgage. If he *had made the tenancy of the plaintiff part of the consideration for the contract, by paying a larger sum for the farm on that account, that might have been a cause for rescinding the agreement, if he had found the tenant unable to carry on the farm. But he was cautious and attentive to his own interests, and, by a term in the agreement, he was not bound to keep the plaintiff as his tenant beyond a year. That was a term in it which makes the tenancy of no consideration. If there had been a lease for fourteen or fifteen years, and the tenant had become insolvent, it might have been a reasonable objection; but I cannot imagine that the contract is to be set aside because of the inability of the defendant to take the plaintiff as a tenant for a single year under such circumstances. With respect to what has been said relative to the form of the contract, I cannot construe it to mean that the contract should be binding on one party and not on the other. I think it must mean that the contract should be at an end, in case there was a reasonable difficulty as to the title. There is nothing, therefore, in these two objections.

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It then appears that, in September, 1833, the defendant was willing to take the title, provided he could get 700*l.* allowed him for dilapidations. If at law he had taken his present ground of defence, he would have been answered, that, in September, he agreed to the contract, upon being allowed the 700*l.*, and

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that the parties only differed upon that. According to the ancient practice, unless the plaintiff first proceeded at law and recovered damages, he could not file his bill for specific performance. That is altered now, but still it is a criterion for the decision of a court of equity. I cannot doubt of this case. At law the plaintiff must have succeeded. The agreement must be performed: the Master to consider to what extent the estate has been deteriorated.

1835.
Jan. 30.
Feb. 17.

MARSHALL v. COLLETT.

(1 Y. & C. 232—239.)

[232]

A limitation in a settlement "to the executors and administrators of A., for their own use and benefit," unconnected with any other limitation shewing more specifically who are to take, is void for uncertainty.

By an indenture dated the 4th September, 1802, and made between George Marshall, since deceased, of the first part, the plaintiff Ann Marshall, the wife of the said George Marshall, of the second part, and John Meysey, Richard Cox, and Joseph Pridham of the third part, it was declared and agreed, that the said John Meysey, Richard Cox, and Joseph Pridham, and the survivors and survivor of them, and the executors and administrators and assigns of such survivor, should stand possessed of the sum of 4,000*l.*, 5*l.* per cent. Navy Bank Annuities, which had been transferred into their joint names, and the dividends and interest thereof, upon trust to permit and suffer the said George Marshall, or his assigns, to receive for his or their own use and benefit the dividends and interest thereof, during the joint lives of himself and the said plaintiff; and in case he should survive the said plaintiff, then from and immediately after her death, upon trust to transfer the said stock unto the said George Marshall, his executors, administrators, or assigns, to and for his or their own use and benefit; but in case the said plaintiff should survive the said George Marshall, then, upon further trust, that the said trustees, and the survivors, &c. should, from and after the decease of the said George Marshall, receive the dividends and interest of the said sum of 4,000*l.*, 5*l.* per cent. Navy Bank Annuities, during the life of the said plaintiff, and pay and dispose of the same dividends and interest as the said

plaintiff, notwithstanding her coverture, should, in manner therein mentioned, *appoint, for her sole and separate use; and after the decease of the said plaintiff, surviving the said George Marshall as aforesaid, upon trust to assign and transfer the said sum of 4,000*l.*, 5*l.* per cent. Bank Annuities, unto the executors or administrators of the said George Marshall, to and for their own use and benefit. And it was thereby provided and agreed that the said plaintiff should accept, and she did thereby accept, the provision made for her by the present deed, in lieu of a certain annuity which had been secured to her, and in lieu of dower or thirds, and free bench at the common law, &c.

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[*233]

George Marshall died intestate, leaving the plaintiff and four children surviving him, and letters of administration of his personal estate were granted to the plaintiff.

Upon the death of George Marshall, it was considered that the plaintiff, under the Statutes of Distribution, was entitled to one-third of the 4,000*l.* stock comprised in the settlement; and, accordingly, the same having in the interim been converted by Act of Parliament into a sum of 4,200*l.* New 4*l.* per cent. Bank Annuities, the trustees transferred one-third of it to the plaintiff; the remaining 2,800*l.* stock being reserved for the children, in equal shares, subject to the life interest of the plaintiff under the settlement. One of the children afterwards died intestate and unmarried, whereby one-fourth of his share accrued to the plaintiff, and the residue to the surviving children. * * *

The bill, which was filed against Collett and the plaintiff's three children [prayed that the plaintiff might be declared absolutely entitled, for her own use and benefit, to the 2,800*l.* stock, and that the same might be transferred to her accordingly].

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On this day the cause came on to be heard on demurrer.

Feb. 17.

Mr. Boteler and *Mr. G. Richards*, for the demurrer.

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Mr. Simpkinson and *Mr. Rudall*, for the bill :

The words used are executors or administrators, which means that they should take by purchase. If it had been intended that they should take through the husband, the word "and" would have been used. It might have been intended to give the wife

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that chance. In the first clause of the settlement, the representatives take by limitation; in the last, they take absolutely. By this construction effect is given to all the words of the settlement. In this case it so happens that the wife, who has given a valuable consideration for her interest, is the party entitled. She has given up her right to dower and free bench, and an annuity of 200*l.* per annum. The Court cannot look to the absurdity of the limitation, supposing it to be absurd, but only to the language of the instrument: *Evans v. Charles* (1), *Jennings v. Gallimore* (2), *Sanders v. Franks* (3).

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Mr. Boteler, in reply, was stopped by the Court.

THE LORD CHIEF BARON :

It is enough to decide this case on the words of the settlement, without going further and resorting to general principles. Here it is clear that the words “for their own use and benefit” are not used in the sense contended for by the plaintiff. It is urged that, under the first clause, the executors and administrators take by limitation, and in the last by purchase; and that otherwise the Court must reject from the last clause the words “own use and benefit.” I think that as the same words are used in both the clauses, they must in each case receive the same signification. The words in question may be rejected from the first clause without affecting the sense or altering the construction; and I think that the same words may be rejected from the second also. The two clauses must be construed in the same way.

But I do not stop here. The case of *Evans v. Charles* is clearly not law; and *Sanders v. Franks* is not an authority for the proposition advanced. Suppose, on a marriage settlement being made, it was intended to give one of the parties the power of appointing beneficially to his executor; might it not be said, “to such person as A. B. shall appoint executor by his will, or if he should fail of appointing, to such persons as shall appear to be his next of kin at his death?” But according to the words

(1) 1 Anstr. 128.

(3) 17 R. R. 202 (2 Madd. 147).

(2) 3 R. R. 77 (3 Ves. 146).

of the present settlement, if the construction contended for be adopted, either a creditor, or such person as the Bishop shall appoint, may take. In that view of the case, the very vagueness of the limitation is sufficient to make it void. The demurrer must be allowed.

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TOLDERVY v. COLT (1).

(1 Y. & C. 240—245; reversed on appeal, 1 Y. & C. 621—643; S. C. 5 L. J. (N. S.) Ex. Eq. 25.)

A testator devised his real estates to trustees, upon trust that his daughter M. should until twenty-one, if sole and unmarried, receive thereout an annuity of 60*l.* and that she should thereafter and until thirty-one, if sole and unmarried, receive a further annuity of 40*l.*; but in case his said daughter should marry without the consent of his trustees, then she should only receive an annuity of 50*l.*, and the said estates should immediately upon such marriage be in trust for the children of M., under such limitations as in the will mentioned; and for default of such issue, in trust for the testator's sister S. Provided, that if M. should marry with the consent of the trustees, the estates should be in trust for her and her husband for their joint lives and the life of the survivor, with remainder to the children of the marriage, under the same limitations as before. M. married with the consent of the trustees, and died without issue: Held, that the remainder to S. was conditional, depending on M.'s marriage without consent; consequently, that M. having married with consent, the remainder to S. failed, although M. died without issue.

1835.
Jan. 30.
Feb. 18.

On Appeal.
1835.
Nov. 16, 18.
1836.
Feb. 26.
[240]

JAMES BOWMAN CLARKE, by his will, after directing his just debts and funeral expenses to be paid, devised and bequeathed unto his friends, William Toldervy and Thomas Davis, their heirs and assigns, all his freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the county of Hereford, and elsewhere, "upon the trusts, and subject to the powers, provisoes, and limitations hereinafter expressed and declared, of and concerning the same (that is to say); in the first place, to the intent and purpose that my daughter Mallett shall from time to time until she shall have attained the age of twenty-one years, if sole and unmarried, have, receive, and take annually out of the rents and profits of the said premises, one annuity or yearly sum of 60*l.*, to be paid to her by the said William Toldervy and Thomas Davis, their heirs or

(1) S. C. at law, 1 M. & W. 250; Tyr. & Gr. 324.

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[*241]

assigns, by four even and equal portions, at or upon four days in every year, (that is to say), &c.; and to the further intent that my said daughter Mallett may from time to time thereafter, and until she shall have attained the age of thirty-one years, if she shall so long remain sole and unmarried, have, receive, and take out of the rents, issues, and profits of the said premises, one further or other annuity or sum of 40*l.*, to be paid and payable to her by the said William Toldervy and Thomas Davis, or the survivor of them, or the heirs or assigns of such survivor, &c. But it is my will, and I do hereby declare, that in case my said daughter Mallett shall, either before she shall have attained the age of thirty-one years, or afterwards, marry without the consent *of the said William Toldervy, if living, and after his decease, without the consent of the said Thomas Davis, first had and obtained in writing under the hands and seals of them respectively, then she shall be paid for and during the term of her natural life only one annuity or yearly sum of 50*l.*, and not the other annuities, or either of them. And from and immediately after the marriage of my said daughter without such consent as aforesaid, I will, direct, and devise, that all the said freehold messuages, lands, tenements, and hereditaments, with their and every their appurtenances, shall be in trust for all and every the child and children of the said Mallett, lawfully to be begotten, in such shares and proportions, manner and form, as they the said William Toldervy and Thomas Davis, and the survivor of them, or the heirs of such survivor, shall from time to time direct and appoint," &c. In default of appointment, the testator directed that the said freehold lands and hereditaments should be in trust for all the children of Mallett, as tenants in common in fee, with cross remainders between them, and if but one child, in trust for such surviving or only child in fee. "And for default of such issue, then in trust as to one moiety or half part of the said freehold messuages, lands, tenements, hereditaments, and premises, for my sister, Lady Frances Burrard, and her assigns, for and during the term of her natural life; and from and immediately after her decease, in trust and for the use of my sister Sarah, the wife of the said William Toldervy, and her heirs and assigns for ever. And as to the other moiety of the

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[*242]

said messuages, lands, tenements, and hereditaments, with the appurtenances, in trust and for the use of the said Sarah Toldervy, her heirs and assigns for ever." The testator then devised certain leasehold hereditaments to his trustees upon the same trusts and under the same limitations as he had declared concerning his freehold estate, or as near thereto as the different natures of the respective *properties would permit. Then followed this proviso: " Provided always, and it is my will, that in case my said daughter shall in the lifetime of the said William Toldervy marry with his approbation and consent, or after his decease, with the good-liking, approbation, and consent of the said Thomas Davis, or the legal representative of the survivor of them, then and in such case it shall and may be lawful for them, or the survivor of them, or the legal representative of the survivor of them, to convey the said freehold messuages, lands, tenements, and hereditaments, and to assign the said leasehold messuages, lands, tenements, and premises unto such person and persons, use and uses, as they or the survivor of them, or the legal representative of the survivor of them, shall think proper; so that the same is conveyed and assigned upon trust only, and for the use of my said daughter Mallett, and such husband as she shall marry with such consent as aforesaid, for and during their joint lives, and the life of the survivor of them (but not without impeachment of waste), with remainder to the issue of the body of my said daughter, in such manner, shares, and proportions, as they my said trustees, or the survivor of them, shall think proper, direct and appoint; and for want of such direction, limitation, or appointment, in such shares and proportions, as are hereinbefore limited respecting the same." The testator then directed an additional allowance to be made to his daughter at the discretion of his trustees, until she should attain the age of thirty-one, if she so long remained sole and unmarried. He then provided for the maintenance of his daughter's children, in case she married without consent. And then reciting, that he was entitled to the remainder in fee of certain hereditaments in Whitechapel, he gave and devised the same unto his sisters, Lady Frances Burrard and Sarah Toldervy, and to the heirs and assigns of the said Sarah Toldervy.

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[*243]

The testator died without revoking his will, leaving *his two sisters and his daughter Mallett surviving him. Mallett attained her age of twenty-one, and afterwards, with the consent of William Toldervy, married the Reverend James Colt. Mr. and Mrs. Colt died without ever having had any issue. Sarah Toldervy survived her sister Lady Frances Burrard, and devised all her real estates to James Bayley Toldervy in fee. James Bayley Toldervy died, having made a settlement of the property comprised in the above will in favour of his wife and children.

The present bill was filed by the widow of James Bayley Toldervy against Sir John Colt (who upon the death of his uncle, Mr. Colt, had taken possession of the property), against the heir-at-law of the surviving trustee under the will, and against the children of James Bayley Toldervy. It prayed delivery of possession of the property and title-deeds to the plaintiff; an account of the rents and profits received by the defendant Colt since the death of his uncle; a receiver; injunction, &c.

The defendant, Sir John Colt, having put in his answer, admitting the possession of certain deeds relating to the property in question, *Mr. Temple* and *Mr. Wilcock*, for the plaintiff, moved for their production.

Mr. Rolfe and *Mr. Cooper* resisted the motion on two grounds: first, that supposing the plaintiff had any title under the will, she had no right to call upon the defendant to disclose his title; secondly, that the plaintiff had no title under the will.

[The Court gave judgment on both points in favour of the plaintiff.]

[Subsequent proceedings were taken in the cause, in the course of which his Lordship,] considering the will, on which the plaintiff's claim depended, to be one of difficult construction, and to involve a question of some importance, directed that the cause should be heard before the full Court.

1835.
Nov. 16.
[621]

The cause now came on for hearing. The defendant, Sir John Colt, gave in evidence the marriage settlement of Mr. and Mrs. Colt. By this settlement, dated the 30th of November,

1782, and reciting the will (1) of James Bowman Clarke, the freehold property in question was conveyed by the trustees, Toldervy and Davis, to certain uses *therein mentioned, until the marriage; and after the marriage, to the use of Mr. and Mrs. Colt for their joint lives, and the life of the longest liver of them, but not without impeachment of waste; with remainder to trustees to preserve the contingent remainders; with remainder to the use of all and every the child and children of Mr. and Mrs. Colt, to be equally divided between or among them, if more than one, share and share alike, as tenants in common in tail, with benefit of survivorship; and if there should be but one child, or all but one should die without issue, to the use of that one child in tail. By the same indenture the leasehold property was made subject to limitations, as similar as possible to the limitations in the freehold estates.

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[*622]

Mr. Temple and Mr. Wilcock, for the plaintiff:

* * It is clear, upon the construction of this will, that, whether the marriage turned out to be provident or improvident, the children were to stand in the same situation except as to time; and if there were no children, the estate was, in either case, to go over to the sisters: *Mackinnon v. Sewell* (2).

[625]

*Mr. Knight, Mr. Preston, and Mr. Cooper, for the defendant,
Sir John Colt:*

* * It is clear that upon the grammatical construction of the will, the ultimate limitation to the sisters depends solely on the condition that the daughter marries without consent. * * In this case the governing motive of the testator was to prevent an improvident marriage by his daughter. With that view he limits her interest in the property, previously to her attaining thirty-one. No provision whatever is made for her attaining that age unmarried; and it is clear that if that event had occurred, the rents would have belonged to her as heiress-at-law of the testator. The testator has evidently left a portion of his property to be dealt with by the law. He makes no provision as

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[628]

(1) See *ante*, p. 257.

(2) 39 B. R. 175 (2 My. & K. 202; C. P. Coop. 224).

TOLDERVY
*
COLT.
[636]

to the rents between the time of his daughter arriving at thirty-one and dying unmarried. * * The contingency of the daughter's marrying without consent pervades and governs the whole of that clause which contains the limitation to the sisters. * * We contend that the marriage of the daughter without consent was the strict condition on which alone the sisters were to take; that there is nothing in the will repugnant to this construction; that a contrary construction might, if there had been issue, have defeated that issue; and that such a result was directly at variance with the intention of the testator.

Mr. Johnes, for the children of James Bayley Toldervy.

Mr. Stinton, for the heir-at-law of the surviving trustee.

Mr. Temple, in reply:

[631] * * Upon the principles of *Murray v. Jones* (1), and *Jones v. Westcomb* (2), this is a conditional limitation to the sisters, and not merely a gift upon condition.

1836.
Feb. 26.

THE LORD CHIEF BARON now delivered the judgment of the COURT. [After referring at length to the will he said:]

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[* 636]

Upon the former argument, it struck me that the testator's intention *to provide for the sisters was very apparent. In the first bequest, he had devised the remainder expectant upon the estate tail in the children, to the two sisters; and I thought that he had a design to provide for his sisters this estate in remainder at all events. Although the will was expressed obscurely and ambiguously, it had occurred to me that by putting the proviso for the case of a marriage with consent into a place which I thought I could discover to be its proper place, that would remove all difficulties, and would effectuate the testator's intention, that the remainder to the sisters should take effect after the estate tail given to the children, either in the case of a marriage without consent, or a marriage with consent. That was the impression under which I certainly gave my first opinion; but

(1) 13 R. R. 104 (2 V. & B. 313).

(2) 1 Eq. Ca. Abr. 245, pl. 10.

upon the elaborate argument which we have had upon the subject since, I have seen reason to change that opinion.

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COLT.

Now, let us see what it is that the children take. The estate is given to them expressly in case of a marriage without consent. The remainder is to take effect after that estate expires, and is dependent upon that estate, and no other. That is the first remainder, and it begins with the words, "and for default of such issue." Now, it is admitted on both sides, and I think it cannot be denied, that the word "issue" there, means issue of the children. It cannot mean issue of the daughter, because no estate tail is given to the daughter, nor, in that clause, any estate for life; and, therefore, a limitation to the sisters, after a general failure of issue of a person who was to take no particular interest, would have been too remote. What is given to the daughter, in case of her marriage without consent is, an annuity of 50*l.*, and nothing more; and immediately the children are born, they take estates tail, liable to be modified by any direction or appointment the trustees may make. If they make no appointment, they take estates tail, as tenants in common *with cross-remainders. Then upon what does the remainder to the sisters depend? It depends upon that estate tail. If that estate tail is taken away, the remainder is taken away.

[*637]

The question has been argued on behalf of the plaintiff, as if the present ought to be ranged under that class of cases in which it is contended that the case of *Murray v. Jones* (1), and the more modern one of *Mackinnon v. Sewell* (2), are comprised.

[His Lordship then referred to those cases, and then reverting to the will said:]

I find this extraordinary fact in this will—I find a clear case in which the sisters could by no means have any remainder at all, and that is this: the testator has provided for his daughter till she arrives at the age of thirty-one unmarried; and he has provided for her also if she marries before or after thirty-one; but if she remains single from thirty-one to the day of her death, the only provision made for her is a provision by law; there is no provision by this will. It was argued in that case that he must be supposed to intend to die intestate. I do not think he intended any such thing; but a

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(1) 13 R. R. 104.

(2) 39 R. R. 175.

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man may, without intending to die intestate, in effect make no provision at all but what the law makes. It appears to me a confusion of ideas to say that a man intends to die intestate when he makes a will, because he probably intends to devise every thing; but it happens very often that he omits to make a particular devise; and if it is a *casus omissus*, a court of law cannot supply it afterwards. Now, then, suppose the daughter had never married at all, why the object of the trusts given to the trustees being to provide for a particular person, the daughter, her children, her husband, and, in one case, for the persons in remainder, who are specified in the will, if she does not marry at all and dies unmarried, there is an end of their trust, except that which the law raises for the benefit of the daughter. What estate, then, does she take? Not an estate for life—she takes no particular estate—and therefore no remainder can depend upon her life. She takes no estate tail, and therefore no remainder can depend upon that estate. She clearly takes an estate in fee, liable, if you please, to be divested by her marriage, with or without consent, after thirty-one; but yet, if she remains unmarried after thirty-one, and dies, it is clear that she dies seised of an equitable estate in fee-simple in all these premises; and it goes, therefore, to her heir-at-law, or may be bequeathed by her will.

[641] There is one case, therefore, where clearly the testator has omitted to make any provision for his sisters at all, or to give any such estate as could support any remainder to the sisters. Well, then, it is asked, and I think very properly asked, as one case of that sort was plain, manifest, and incontrovertible, why should not the other case also of a marriage with consent be ranged under the same class of cases either of a design to die intestate, if you please so to put it, or of a *casus omissus*; and why should you supply it in one case more than the other? It is very remarkable that in the proviso for a marriage with consent, the estate tail is given to the children in a different manner. The first estate tail vests in them the moment they are born. They take as purchasers in both cases; but in the first case they take the estate tail from the moment they are born. But in the other, the estate is given to the husband and

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the wife for life, and for the life of the survivor; and then, the estate tail depending on that estate for life, goes to the children. Undoubtedly that would make no difference, if it were followed either in words or by construction, with a remainder over to the sisters. But that proviso for a marriage with consent is followed by no such remainder to the sisters. Now, where shall I put it in the will? What right have I to say, as I first thought I had, that I can put it before the limitation of the remainder to the sisters? Suppose he himself had inserted it in the will at an earlier part: he might still have put it after that remainder. If he had so done, the same difficulty would have occurred as occurs now, though placed after it at a greater distance. I cannot say, therefore, that he intended that the limitation to the sisters of a remainder dependent on a particular estate tail, granted upon a certain condition only, was to follow the estate tail granted upon another condition, and in a different part of his will. If I were asked my opinion of the intention of the testator, if the case had been suggested to him, I should say, that *if he had been told, "You have made a provision for your sisters in case of a particular marriage without consent; but in the other parts of your will you have left no provision for them, as to your estates bequeathed to your daughter:" I should think it very probable indeed he would have said: "Then fill up that omission, and give them the remainder again." But a court of justice has no right, in interpreting a will, to make a probable conjecture of what a testator would have done in a particular case, and then to do it for him, when there are no words in the will to justify that course. We are bound to find out the intention of the testator; and, though that intention be expressed obscurely or ambiguously, yet if it is expressed in words some how or other, or expressed by so strong an implication, that you cannot avoid seeing he contemplated the thing and meant it, though he has not expressed it accurately; in that case you are bound, if you can find such intention expressed in the will, to give effect to it, and very often to mould and modify the estate in such a way as to give effect to the intention that he either clearly has expressed or intended to express. But if the words do not express any such intention, it is not because you can

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conjecture such intention to be highly probable, that you are to insert words in order to give effect to it. The testator has not done what he probably would have done, had the case occurred to him; but if he has not done it, a court of law has no right to do it for him. It therefore appears to me that we cannot, by anything but a probable conjecture, which, in my opinion, the Court has no right to act upon, insert this proviso immediately before the limitation over of the remainder to the sisters. And if we cannot do that, then the limitation over to the sisters clearly depends upon the conditional estate tail given to the children; and as that conditional estate tail never existed in the case that has occurred, of course the remainder falls to the ground.

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I ought to state, that it is the opinion of some of the *Judges, and, for aught I know, of all of them; certainly, two have expressed it to me, that the proviso for making a settlement in the case of a marriage with consent was not imperative upon the trustees. I own that I myself do not entirely concur in that opinion. I am inclined to think, that, although the words used in that proviso are, "it shall and may be lawful," the trustees would probably have been compelled, if the necessity had arisen, to make that conveyance, or to hold the estate in trust for the children. That depends on a class of cases of which *Brown v. Higgs* (1) is a leading authority in modern times. Upon that, and other cases of the same nature, I think it cannot be doubted, that where an apparent power is combined with a trust, if the power is not executed, a court of equity will execute the trust in some manner; and therefore, that if the trustees in this case, supposing children to have been born after a marriage with consent, had omitted to make any conveyance at all, a court of equity would have allowed the children to have had the benefit of that clause in the will, considering it as a trust combined with a power. However, the judgment of the Court in this case must be given without reference to that interpretation; because, as the other Judges are of opinion that it was a matter of mere discretion in the trustees, if they are right in that opinion, there can be no doubt at all that the plaintiff could

(1) 4 R. R. 323 (8 Ves. 561).

have no claim. But the ground upon which we are all agreed in giving judgment for the defendants is this, that we think we cannot indulge in conjecture for the purpose of introducing one proviso into another place than that where it exists in the will, and into that precise place which would make it give effect to the limitation over of the remainder to the sisters. We think we cannot do that but by conjecture, which we have no right to indulge in; and upon this ground the bill must be dismissed.

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Decree accordingly.

BAKER v. CARTER.

(1 Y. & C. 250—256; S. C. 4 L. J. (N. S.) Ex. Eq. 12.)

A trustee who has purchased the trust property and sold it at a profit, and who has been compelled by a suit in equity to refund that profit, will not, except under circumstances affecting him with moral fraud, be charged with the costs of the suit.

1835.
Feb. 11.
[250]

CHARLES CARTER, of Eton, boat-builder, by his will gave and devised all and singular his real estates which he might die possessed of, unto his brother James Carter the elder, and another trustee, upon trust to receive *the rents of the same, and to pay and apply them unto and to the use and benefit of his wife Charlotte Carter, and his two daughters, until they should attain their respective ages of twenty-one years. And from and after the decease of his said wife, he gave his real estates to his two daughters, as tenants in common, their heirs and assigns for ever. And he gave and bequeathed all and singular his stock in trade, household goods, plate, china, and all other his effects, unto his said wife Charlotte Carter, upon trust to carry on the business for the benefit of herself and his two daughters, and after her decease, to his two daughters share and share alike. By a codicil he appointed James Carter the elder and another person his executors. Carter alone proved the will in December, 1815.

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The bill, which was filed by the two daughters and the husband of one of them, against Charlotte Carter, James Carter the elder, and his son James Carter the younger, charged various acts of

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fraud against all the defendants in relation to the testator's estate, and prayed a general account.

The charge against Mrs. Carter was not substantiated. That against James Carter the elder and his son was to a certain extent proved, and arose out of the following transactions. In 1816, eight leasehold houses of the testator being in mortgage to one Sawyer, the mortgagee called in his mortgage money. Carter the elder having no assets of the testator in his hands, advertised these premises for sale in the *Windsor Express*, and offered to sell them to the mortgagee, who refused to buy them. They were then valued by a surveyor at 936*l.*, and, as sworn by Carter in his answer, he again endeavoured to procure a purchaser for them, but without success. Eventually he sold them to his son James Carter the younger, for 936*l.*, the consideration money being, as he admitted, his own money, and not that of his son. Six years afterwards, *the corporation of Windsor, requiring the scite of these premises for the purpose of building the new bridge of Windsor, purchased them of James Carter the younger for 1,200*l.*, and 50*l.* expenses.

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Upon the hearing of this cause before Lord Lyndhurst, C. B., at the sittings after Trinity Term, 1832, his Lordship was of opinion that the before-mentioned transaction could not be supported in a court of equity; it was therefore ordered that the defendant James Carter the elder should account for the sums of 1,200*l.* and 50*l.*, with interest at 4*l.* per cent., from the 6th July, 1822, which was the time of the sale to the corporation of Windsor; and should also account for the rents and profits of the premises from the death of the testator till the 6th July, 1822.

The cause coming on to be heard upon further directions, the main question was, whether the defendant James Carter the elder should pay the costs of the suit.

Mr. Jervis and *Mr. Dixon*, for the plaintiffs. * * *

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Mr. Simpkinson and *Mr. James Watson*, for the defendants
Carter the father and Carter the son :

* * Here there was, morally speaking, no fraud; and Lord

LYNDHURST was of that opinion *at the hearing. His Lordship set aside the transaction solely on technical grounds of equity.

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Mr. G. Richards, for the defendant Charlotte Carter.

Mr. Jerris, in reply.

THE LORD CHIEF BARON :

* * I agree that where a trustee purchases the trust estate for his own benefit, the simple obvious rule is, that the purchase must be set aside; but it does not therefore follow that such a transaction bears the character of fraud in every case. On the contrary, the trustee may do it under circumstances beneficial to the trust estate, and to the principal parties concerned. A trustee, therefore, is not necessarily to be punished in cases of this nature; though, if he violates his trust, and is guilty of fraud, no doubt the Court will oblige him to pay the costs which by his misconduct the cestui que trusts have been put to. [After referring to the facts his Lordship continued as follows:] It comes then to the question whether, if an executor should purchase the testator's property, and give the estate the full benefit of the purchase, and at any time afterwards under extraordinary circumstances which no one ever contemplated, the property should be sold at a greater value than that for which it was bought, then not only by an inexorable rule of equity is the money to be paid back to the testator's estate, but the executor is to be accused of fraud and made to pay all the costs. If he had made no profit by the purchase, the parties interested would have been satisfied. Subsequent events cannot vary the moral conduct of the defendant, though they may alter his legal responsibility. There is no ground, therefore, for charging him with fraud, or visiting him with the costs of this suit. * * *

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There was no fraud whatever in the son. I do not see clearly why he was a necessary party, the bill not seeking to set aside the release. Except, perhaps, for the purposes of discovery, he was clearly not a necessary party. He is, therefore, entitled to his costs.

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1835.
Feb. 17.

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PIERCE v. SCOTT.

(1 Y. & C. 257—260; S. C. 4 L. J. (N. S.) Ex. Eq. 36.)

Where lands are devised in trust for the payment of the testator's debts generally, with a direction that his estate at A. shall first be sold for that purpose, and if that be not sufficient, then his estate at B.; a good title cannot be made to the estate at B., unless the vendor shews clearly that the trust remains unsatisfied, and that the produce arising from the sale of the A. property would, beyond all doubt, be insufficient for the purposes of the trust.

JOHN HARVEY PIERCE, by his will dated the 28th March, 1818, after specifically bequeathing his furniture and other personal estate except his leasehold property, gave, devised, and bequeathed to four trustees, whom he appointed his executors, their heirs and assigns, all his real estate, and also his leasehold estates and all his interest therein, upon certain trusts mentioned in his will, for the benefit of his children. The will then contained the following clause: "And my will is, that if, at my decease, any mortgage or other debts remain unpaid, then my trustees aforesaid shall sell my interest in my said leasehold estates, and so much of my freehold estates as may be sufficient to pay off all such said debts and mortgages, provided the majority of the said trustees deem it best so to do; in which case my will is, that the three houses in Hermitage Street be first sold, after the leasehold estates are disposed of; then the house and land at Upchurch, in the county of Kent; and if these are not sufficient, then the public-house premises at Union Stairs, reserving, if possible, the ground rent of four houses on the north side of the said Hermitage Street, and the public-house, 'The Edinburgh Castle,' with the wharf, warehouses, stable, and dwelling-house adjoining, situate in Wapping, near the Hermitage aforesaid, in the county of Middlesex."

The testator died soon after the date of his will. Three of the trustees disclaimed, in consequence of which the execution of the trusts devolved on the remaining trustee, who was the eldest son of the testator, and plaintiff in this suit.

In December, 1832, the plaintiff caused the "Edinburgh Castle" and the other premises at Wapping, which were freehold, to be put up to sale by public auction. The *defendant

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was declared the purchaser, and paid his deposit. Upon his afterwards objecting to the title, and refusing to complete the purchase, the present bill was filed against him for a specific performance of the contract. It contained an allegation that the other property mentioned in the will, and thereby directed to be sold before the property sold to the defendant, is subject to mortgages and other charges, to the value or more than the value thereof. That the said premises sold to the said defendant as aforesaid, are also subject to a mortgage debt and arrears of an annuity to a considerable amount, although the same will be discharged out of the said defendant's said purchase-money; and that there are also various other debts of the testator to a large amount still owing and unpaid; and that there are no other funds available for the payment thereof than the defendant's aforesaid purchase-money.

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The cause having been heard, and the Master in pursuance of the usual reference having reported that a good title could not be made to the premises in question, the plaintiff excepted to the Master's report.

Mr. Rogers, in support of the exception :

* * It may be contended, that the length of time since the testator's death, which took place fifteen years ago, raises a presumption that the debts have been paid, and consequently that the sale is improper. It is, however, clearly established, that when property is bequeathed upon trust for the payment of debts, a creditor, though only by simple contract, may at any time within twenty years from the testator's death, file a bill to enforce that trust: *Jones v. Scott* (1). No purchaser, therefore, within a period less than twenty years, has a right to set up any presumption of this nature against the propriety of the sale.

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Mr. Treslove and Mr. Kenyon Parker, *contrà* :

No doubt, where real property is devised for the payment of the testator's debts generally, or even for raising so much money as the personal estate shall be deficient for that purpose, the purchaser will not be bound to see to the propriety of the sale;

(1) 1 Russ. & My. 255. Rev. 4 Cl. & Fin. 382, 42 R. R. 29.

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but it is otherwise where the debts are specified. Here the mortgaged debts are specified debts, which the purchaser is bound to see paid. It is not even clear that the testator did not mean to exonerate his personalty. Besides, there is no authority for saying that where a testator directs his estates to be sold in succession, the executors may sell the last first, and come into a court of equity to compel the purchase. The Court will not compel a purchaser to take a doubtful title: *Shapland v. Smith* (1). The lapse of fifteen years is strong evidence that the debts are paid.

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Mr. Rogers, in reply :

If the allegation in the bill is sufficient, the plaintiff must have a decree. It is not necessary for him to prove by evidence that there are debts ; and the lapse of fifteen years is not notice that there are no debts. There may be bond debts. At law, twenty years are allowed for claiming a bond debt.

THE LORD CHIEF BARON :

I feel considerable doubt upon the point. I will not say that it is clear that the purchaser is not liable to be compelled to complete his purchase ; at the same time, there is a suspicion in regard to the payment of the debts. Suppose the circumstances are such as raise a suspicion that the plaintiff is not complying with the terms of the trust, the question is, whether that is not notice ? Now it is not likely the creditors went so long as is suggested without enforcing their demands. I do not like to lay down general propositions unnecessarily, but if I were a purchaser, I should say that this was not a safe or prudent purchase.

Exception overruled ; bill dismissed with costs.

(1) 1 Br. C. C. 74.

D'ALMAINE AND ANOTHER v. BOOSEY (1).

(1 Y. & C. 288—303; S. C. 4 L. J. (N. S.) Ex. Eq. 21.)

1835.
March 3.

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To publish, in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright, is an act of piracy.

The English assignee of the copyright of a foreign musical composer is within the protection of the statutes relating to copyright. *Semble*, that a foreigner who resides and publishes in England, is within the like protection.

DENIS FERDINAND ESPRIT AUBER, of Paris, in the early part of the year 1834, wrote and composed a certain book comprising the music of an opera called “Lestocq,” which was first represented at Paris on or about the 24th of May in the same year.

By an indenture, dated in June in the same year, stamped according to the laws of England, and made between Auber of the one part and the plaintiffs of the other part: Auber, in consideration of 80*l.* paid to him *by the plaintiffs, assigned to the plaintiffs, their executors, administrators, and assigns, all his copyright in the before-mentioned book, and the several airs, pieces, or compositions comprising the music thereof, and the sole and exclusive right of printing, re-printing, and publishing the same and every part thereof; saving and reserving to Auber and his assigns the right and privilege of printing, publishing, and vending, after the first publication thereof by the plaintiffs (such first publication not being delayed beyond the 15th of July then next), copies of the said book, and the airs or compositions comprising the same, in France and Germany, or elsewhere, not being any part or parts of the United Kingdom of Great Britain and Ireland, or any of the colonies or dominions thereof.

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About the 12th of June, 1834, the plaintiffs, who carry on business in co-partnership as music sellers, gave notice in writing to persons connected with that trade, and, amongst others, to the defendant, that they had purchased the copyright in the music of “Lestocq.” On the 16th of June they caused the book, comprising the music of the whole opera, to be entered

(1) *Fairlie v. Boosey* (1879) 4 App. Cas. 711; 48 L. J. Ch. 697. The subject of musical copyright is now dealt with by a series of later Acts

of Parliament. See 3 & 4 Will. IV. c. 15; 5 & 6 Vict. c. 45; 45 & 46 Vict. c. 40; 51 & 52 Vict. c. 17.—O. A. S.

D'ALMAINE at Stationers' Hall. On the 30th of June a like entry was made
 v. of the overture; and on the 23rd of July a like entry was
 BOOSEY. made of the airs. The overture was published by the plaintiffs
 at their shop on the 30th of June, and the airs on or about the
 23rd of July. In August, the plaintiffs published two sets of
 quadrilles, arranged by Wheippert, from the same opera.

In the early part of the year 1835, the plaintiffs discovered that
 the defendant had published several of the airs of "Lestocq,"
 with some alterations, in the shape of quadrilles and waltzes.
 These publications were respectively called "Musard's 57th Set
 of Quadrilles (New Series)": "Musard's 58th Set of Quadrilles
 (New Series)," and "Musard's 42nd Set of Waltzes." They
 were all described on the title page as having been taken from
 Auber's opera of "Lestocq," though arranged by Musard.

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The plaintiffs having filed their bill against the defendant, pray-
 ing for an account of these several publications and of the profits
 arising from the sale thereof, and for an injunction to restrain
 the further sale—a motion was now made for the injunction.

In support of the plaintiffs' case, the affidavit of Mr. Rodwell,
 an experienced musician, was read. With reference to the 57th
 set of quadrilles published by the defendant, he deposed that
 the second quadrille was so completely similar to an air of the
 opera called "Gentille Muscovite," that it was nearly note for
 note the same, even to the accompaniments; that the melody
 of the fourth quadrille was like another air of the opera, with
 some variations in certain bars, which he specified; and that
 the melody of the fifth quadrille was contained in certain bars
 of the overture, which he specified. With reference to the 58th
 set, he said that the first quadrille was founded on, though much
 varied from, an air of the opera called "Le pauvre Ivan." He
 mentioned the several bars in which alterations had been made,
 and stated that in one instance there had been a change of key.
 He made similar statements with respect to the other quadrilles
 and the waltzes; observing, however, that in one of the waltzes
 there were sixteen bars which were not in the original air. He
 concluded his affidavit by saying, that although in several
 instances the music of the quadrilles in question was slightly
 varied from the airs of the opera, yet such variation was not

more than is always found to be necessary when the music of an opera is arranged in the form of quadrilles.

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The defendant, by his affidavit, stated that in December, 1833, an agreement was entered into between him and Philippe Musard, a French subject residing at Paris, that the latter should supply the defendant annually with a stated number of quadrilles, waltzes, and galoppes (1), composed or arranged by him for the piano and orchestra, so *as to suit the London season. That the defendant had no control over Musard as to the subjects to be chosen, or the authors upon whose compositions such quadrilles &c. should be founded; and that he did not know on what the same were founded until they were received by him from Musard; that the quadrilles and waltzes in question were received by the defendant from Musard in pursuance of the foregoing agreement; and that the former were published by the defendant in November, 1834.

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The defendant further stated, that the overture to the opera "Lestocq," as entered by the plaintiffs at Stationers' Hall on the 30th of June, is an abridgment, arrangement, or adaptation of the overture as composed by Auber; and that it is so altered, abridged, arranged, and adapted as to be performed on the pianoforte by one person; and that it is an entirely distinct work from the overture of Auber; which last-mentioned composition can only be performed by the united efforts of a number of persons performing on different instruments. That the defendant's belief is, that the overture so entered was not composed or arranged by Auber in the mode or form in which it was so published and entered by the plaintiffs, but that it was so composed and arranged by some other person. That the airs which were entered by the plaintiffs on the 23rd of July, were in like manner adapted for the pianoforte only. That the defendant's reason for believing that the overture and airs had been arranged by other persons was, that the plaintiffs had entered and published several other airs from "Lestocq," which had been arranged by Adam, Kalkbrenner, and others.

The defendant further stated, that Auber composed only the music of the said opera in the form usually called and known

(1) *Sic* in the report.

D'ALMAINE as the score, which contains the whole of the music to be used
 v. by all the performers collectively with their several instruments.
 BOOSEY. That it is universally known in the musical profession, and the
 [*292] fact is, that the *opera "Lestocq," as entered on the 16th of
 June, is the only one of the compositions before mentioned
 which was composed by Auber himself: and that the several
 other compositions are only arrangements or adaptations, and
 were composed by other persons. That it is in the usual course
 of trade to call such compositions by the name of arrangements
 or adaptations; and that the persons who make or compose them,
 possess an inferior degree of talent to the original composer of
 the opera, who, from his superior talent, would not occupy his
 time or attention upon such a subject. That the value of such
 arrangements or adaptations depends entirely upon the talent
 or ability of the arranger or adapter. That the arrangements
 and adaptations published by the plaintiffs were not intended
 to be used for dancing; while, on the contrary, the defendant's
 publications were expressly intended for that purpose.

Upon this last point the defendant also relied on affidavits
 of two other musicians, who stated that the music of the plain-
 tiffs' publications was adapted for the pianoforte only, in which
 form it was not intended to be danced to; and that, in fact,
 it had not those necessary breaks and portions of melody which
 are absolutely necessary to form a quadrille or waltz, whereas
 the object of the defendant's publications was the arrangement
 or adaptation of the music of "Lestocq," so as to admit of
 the same being danced to; and that in such arrangement or
 adaptation a very considerable degree of musical skill and talent
 is necessary; and that the sale of the quadrilles and waltzes so
 formed, is very much increased or diminished according to the
 talent and ability of the composer or arranger of the same.

With respect to the time of the publication of the opera in France,
 the evidence was contradictory. The plaintiff stated his belief that
 no part of the opera was published by Auber before the 2nd of July,
 1834, about which time it was likewise registered at the proper
 [*293] office at Paris. The defendant, *on the contrary, asserted, that
 from letters which he had received to that effect, he believed the
 publication in Paris had been a month earlier than the 2nd of July.

Mr. Tuciss, for the plaintiffs :

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* * Copyright exists at the common law, and the power to transfer such a right is recognised by the statute of Anne (1), which speaks of authors "who have not transferred to any other the copy or copies of their books." Nothing has occurred in this case to narrow the author's privilege at common law. * * The Act was passed for the protection of British authors. * * *

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(THE LORD CHIEF BARON : The Court considers the importation from abroad an original merit entitled to protection. The contract having been entered into abroad makes [no difference.]

The plaintiffs have used due diligence in the importation. The registration of the work at Stationers' Hall took place before any publication either at Paris or London, and the publication of the first part was within a fortnight after the assignment to the plaintiff. It was impossible to be more prompt ; and, in fact, the registration itself is an inchoate publication.

Mr. Beames and *Mr. Wood*, for the defendant :

* * There is no case in which a court of equity has ever interfered in favour of the copyright of a foreigner, and the assignment of such a right to an Englishman can make no difference.

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But, secondly, supposing the plaintiffs to have a copyright in the work which they have purchased, there has *been no piracy of it by the defendant. * * The defendant's work is merely an adaptation of the original, and such an adaptation is not a piracy : *Gyles v. Wilcox* (2).

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(THE LORD CHIEF BARON : I think that if the original air is published, though with adaptations and harmonies, or for different instruments, it is a piracy, and an action will lie. This is not like the case of an abridgment of a book. The purpose

(1) 8 Anne, c. 19. [Rep. 5 & 6 (2) 2 Atk. 143.
Vict. c. 45, s. 1.]

D'ALMAINE of abridgments is very distinct from that of the works from which
v.
BOOSKY. they are taken. No one can doubt that Viner's Abridgment and Comyns' Digest are original works.)

According to the affidavits of disinterested witnesses of known talents, there is considerable exercise of mind in these adaptations, independently of what is derived from the original composition. Besides, the defendant's work does not pretend to compete with the elaborate work of the plaintiffs. Their publication is intended for the higher purposes of music, while that of the defendant is adapted entirely and exclusively for dancing. * * *

[297] *Mr. Twiss, in reply.* * * *

THE LORD CHIEF BARON [after making some general observations which subsequent legislation has made it unnecessary to retain, said :]

[299] Early in 1834, the plaintiffs purchased the manuscript of the opera in question from Auber. At that time it was not published by any other person. The opera was indeed soon afterwards represented at Paris; but that was no publication. No work was at that time published abroad from which any other work of this nature might have been produced; and Auber being abroad, [*300] sells his very work to the plaintiffs. *The plaintiffs, therefore, acquired a copyright in it before publication. They publish the work. After they have published it, comes out the publication of the defendant; the whole or part of which is alleged to have been copied from that of the plaintiffs. The defendant's case is, that he produced only what he had before purchased at Paris. But as the admitted fact is, that the plaintiffs made the first publication of the work in this country, the circumstance of its being republished at Paris afterwards does not justify the importation of it, because the 12 Geo. II. c. 36 (1), exactly meets that case. If, under such circumstances, the music be in fact republished in this country, the publication of it at Paris affords no protection to the defendant, and his argument drawn from that source falls entirely to the ground. The case, therefore, is that

(1) Rep. S. L. R. Act, 1867.

of a copyright vested in the plaintiffs of a work protected by the statute as well as the common law, and of a piracy committed in the publication of it afterwards by the defendant. The point whether the copyright of a foreigner is protected at all in this country, does not arise in the present case, because the plaintiff D'Almaine is not a foreigner. He could acquire the copyright of a publication as well from a foreigner as an Englishman. If he is the owner of the work, it makes no difference whether he composed it himself or bought it from a foreigner.

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The other point raised by the defendant is this—whether his work, from its particular nature, is to be deemed a piracy. With reference to this question, the facts of the case are as follows: The plaintiffs published, first the overture, and then a number of airs, and all the melodies. It is admitted that the defendant has published portions of the opera containing the melodious parts of it; that he has also published entire airs; and that in one of his waltzes he has introduced seventeen bars in succession, containing the whole of the original air, *although he adds fifteen other bars which are not to be found in it. Now it is said, that this is not a piracy, first, because the whole of each air has not been taken; and, secondly, because what the plaintiffs purchased was the entire opera; and the opera consists, not merely of certain airs and melodies, but of the whole score. But, in the first place, piracy may be of part of an air as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, *à fortiori* they were entitled to publish the melodies which form a part. Again, it is said, that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question, what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are in their nature original. Their compiler intends to make of them a new use; not that which the author proposed to make. Digests are of great use to practical

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men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a *bonâ fide* abridgment, because if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now it will be said that one author may treat the same subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists.

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I remember in a case of copyright, at *Nisi Prius*, a question arising as to how many bars were necessary for the constitution of a subject or phrase. Sir George Smart, who was a witness in the case, said, that a mere bar did not constitute a phrase, though three or four bars might do so. Now it appears to me that if you take from the composition of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them, in a different order or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear. The adding variations makes no difference in the principle.

I see no reason to direct the plaintiffs to go before a jury in a case in which there is no doubt. Certainly, if I had any doubt upon the subject, I should not think myself justified in disposing of this matter without sending it to a jury. It has been said, that the case is too unimportant to be so dealt with; but the same principles must be acted upon, whether the piracy consists merely in the *adaptation of opera music to quadrilles, or in extracting original airs from the finest operas of Rossini or Mozart.

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Injunction granted.

WHITBREAD v. JORDAN (1).

(1 Y. & C. 303—330; S. C. 4 L. J. (N. S.) Ex. Eq. 38.)

An equitable mortgage may be created of copyholds, by the mere deposit of the copy of court roll. It is therefore not sufficient for the protection of a purchaser or mortgagee of copyholds, that he should search the court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title and the copy of his admission to the copyhold premises; and if the latter document is not forthcoming, its non-production must be reasonably accounted for.

Where the creditor of a publican in London took from the latter a legal mortgage of copyhold premises as a security for an antecedent debt, and, at the time of taking this security, knew that the publican was indebted to his brewers, and likewise was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mortgage: Held, that the creditor had such notice of the transactions between his debtor and the brewers, as would have put a prudent man on further inquiry; and that, having omitted to make such further inquiry, the equitable security of the brewers had priority over his legal security.

THE original bill stated that the plaintiffs had for many years carried on the business of brewers, in co-partnership, under the style or firm of Whitbread & Co. That in November, 1827, the defendant Jordan, being or pretending to be seised to him and his heirs, or well entitled, according to the custom of the manor of Tottenham, in the county of Middlesex, to a certain messuage and premises used by him as a public-house, called the "Valiant

(1) *The Agra Bank v. Barry* (1874) L. R. 7 H. L. 135. The case of *Whitbread v. Jordan* has been the subject of controversy; see Lord LYNDHURST's observations in *Cooper v. Emery*, 1 Ph. 390, and Lord St. Leonards' V. & P.; and has been explained as a case of wilful abstention from inquiry.—O. A. S.

1833.
Dec. 19, 20.
1834.
Feb. 17.
1835.
Feb. 12, 28.
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Trooper," and situate in Goodge Street, Tottenham Court Road, applied to the plaintiffs, and requested them to lend him the sum of 2,000*l.* on the security of those premises. That it was thereupon agreed by the plaintiffs and Jordan, that the repayment of the said sum of 2,000*l.* with interest should be secured by a deposit, to be made by Jordan with the plaintiffs, of all the title-deeds, copies of court roll, or muniments of title, relating to the said copyhold premises. That accordingly, on the 17th of November, the plaintiffs lent and advanced to Jordan the sum of 2,000*l.*; and thereupon, in order to secure the repayment *of the same with interest, Jordan deposited in the hands of the plaintiffs divers deeds and copies of admissions, being the title-deeds of the said copyhold hereditaments; and the same were accordingly retained by the plaintiffs as such security as aforesaid. That some time after such deposit had been made, it was discovered that the copy of the admission of Jordan himself to the premises had not been deposited by him with the other documents; and that thereupon Jordan, at the request of the plaintiffs, applied to the steward of the manor, and obtained from him a copy of his admission: which copy, Jordan, on or about the 28th April, 1828, delivered to the plaintiffs to be retained by them together with the other deeds and documents before mentioned, as such security as aforesaid. That 1,750*l.* remained due to the plaintiffs on the aforesaid security.

The bill charged, that the defendant Boulnois claimed to be an incumbrancer upon the said premises, by virtue of certain conditional surrenders made to him by Jordan in December, 1832, and September, 1833; and that he combined with the defendant Jordan to defeat the plaintiffs' security and to deprive them of their lien; and that, for that purpose, the defendants had, without communicating with the plaintiffs, advertised the premises for sale by auction. That the plaintiffs immediately, upon being informed of this circumstance, gave notice to the defendant Boulnois and his solicitors of the priority of their claims; but that the premises had nevertheless been put up to auction and sold. That, previously to the year 1832, the defendant Boulnois had notice that Jordan was in embarrassed circumstances, and had parted with his title-deeds, &c. That,

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upon the occasion of the said conditional surrenders, the defendant Boulnois did not use due caution or diligence in inquiring into Jordan's title; and that no title-deed, copy of surrender, or admission, or other document relating to the premises, was in fact ever produced *or shewn by Jordan to the defendant Boulnois or his solicitors. That it is the usual and ordinary practice for the proposed purchaser or mortgagee of copyhold premises to require from the vendor or mortgagor the production and inspection of the several copies of the surrenders or admissions to the said premises. That without this precaution the proposed purchase or mortgage cannot safely be completed; and that the party who does not take such precaution is guilty of gross negligence and want of caution, and abstains from doing so at his own risk, &c.

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The bill prayed that an account might be taken of what was due from the defendant Jordan to the plaintiffs for principal and interest, by virtue of their security. That it might be declared that they were entitled to a prior charge on the said messuage and premises, and to be paid what should be found due to them, together with their costs of this suit, in the first instance and prior to the defendant Boulnois. That they might be paid out of the monies produced by the sale of the said premises. And that the defendants might be restrained from demanding or receiving the purchase-money or disposing thereof, and from conveying away the premises, &c.

After the filing of the bill, a fiat in bankruptcy was duly awarded and issued against Jordan, under which he was declared a bankrupt. He had, however, filed his answer, which was in substance the same as his evidence given in the cause; contradicting all the material allegations of the bill, as to the circumstances under which the security was given to the plaintiffs.

The defendant Boulnois, by his answer, stated, that previously to December, 1832, there had been various dealings in trade between him and Jordan; and that about the beginning of that month Jordan was indebted to him in the sum of 2,000*l*. That Jordan at that time proposed to give a mortgage to the defendant of the premises in *question, which he stated to be copyhold; and that upon the defendant's expressing his ignorance of the

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nature of copyholds, Jordan explained it to him, and stated, that, it being copyhold property, he had power to mortgage it; and he referred the defendant to the steward of the manor for a confirmation of his statement. That the defendant thereupon asked Jordan, whether he had not mortgaged the premises to his brewers; to which Jordan replied, that not a penny was due upon the property; and that, for the money he had borrowed of the plaintiffs, who were his brewers, they had taken only his note of hand. That the defendant being anxious to use due care in taking the security, went with Jordan to the steward's office; when the steward's clerk inspected the court rolls of the manor, and, after such inspection, informed the defendant that the premises were perfectly unincumbered, and that Jordan was at perfect liberty to mortgage them. That, from what the steward's clerk stated of the nature of copyholds, the impression on the defendant's mind was, that no title-deeds of copyholds were at all necessary, but that the court rolls were sufficient. That in December, 1832, the defendant spoke to his solicitors on the subject, when they said it would be necessary that they should have an abstract of Jordan's title to the premises. That, on learning from Jordan that he had no abstract of title, but that he could obtain one from the steward, he called with Jordan on his solicitors, and told them, that though he wished them to be satisfied on the subject, still, if an abstract of title was not essentially required, he did not wish Jordan to be put to that expense. That he made the last observation not with any desire that a due investigation of the title should be avoided, but solely from a wish to save Jordan any unnecessary expense; more especially as it appeared to the defendant, who was not versed in legal matters, that the title must depend on the entries in the court rolls. That at a meeting, at which were present *the defendant, his solicitors, and Jordan, the solicitors asked Jordan for his copies of the court roll, and documents of title; and that Jordan said he had mislaid or lost them. The defendant then insisted that freehold and copyhold property do not stand on the same footing in regard to the furnishing of abstracts of title and to the production of title-deeds and copies of court rolls; that the production of the copies of court rolls does not make

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out evidence of title to copyhold property, but that the court rolls themselves must be examined; and therefore, that the loss of such copies does not in any degree affect the title; and that stewards are always willing to make out fresh copies. He admitted, that, prior to the surrender of 1832, he had reason to believe that Jordan was indebted to the plaintiffs; but he denied that he was aware, before the filing of the bill, that Jordan had given them the security therein mentioned, or had parted with his title-deeds. He admitted, that, except as stated in his answer, he had not compelled the production of the title-deeds of the premises.

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An injunction having been obtained *ex parte* according to the prayer of the bill, a motion was now made on the part of the defendant Boulnois to dissolve the injunction.

1833.
Dec. 19, 20.

Mr. Simpkinson and Mr. Chandless, for the motion :

* * The proposition the plaintiffs *must make out is, that they have a good equitable mortgage; and, having done so, that the omission to require the delivery of the copies of the court rolls from Jordan was such *crassa negligentia* as will justify the Court in postponing the defendant to the plaintiffs. * * Now, in this case, the most important document—the admission of Jordan himself—was not deposited with the other title-deeds or until some months afterwards. In *Plumb v. Fluitt* (1), * * Chief Baron EYRE distinctly states that the circumstance that the deeds are not forthcoming is not of itself notice of a deposit, but is only a circumstance of evidence to shew that there was reason for further *inquiry; and that, unsupported by any other circumstances, it proves nothing. * * In the present case no necessity existed for inquiring who had the possession of the title-deeds, the rolls of the manor being the fullest evidence of the title.

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Mr. Wigram and Sir George Grey, contra [cited *Jackson v. Roe* (2), *Hiern v. Mill* (3) :]

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It distinctly appears, from Boulnois's inquiry of Jordan whether the brewers had any mortgage, that he had a knowledge

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(1) 3 R. R. 605 (2 Anstr. 432).
(2) 25 R. R. 250 (2 Sim. & St. 472).

(3) 9 R. R. 145 (13 Ves. 114).

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JORDAN. of the general dealings between the parties. It is impossible to say, that Boulnois or his solicitor had not sufficient notice to induce them to make further inquiry. *Martinez v. Cooper* (1), *Taylor v. Baker* (2), and *Horlock v. Priestley* (3), were also cited.

Mr. Simpkinson, in reply. * * *

1834.
Feb. 17.

THE LORD CHIEF BARON (4) (after stating the facts in detail :)

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An application was made by Jordan to Boulnois to allow this debt to increase, which Boulnois consented to on having security for the amount. He inquired of Jordan whether the house was incumbered; Jordan said it was not: the result was, that a mortgage was executed for 2,500*l.* or 3,000*l.* After a short period (about six or eight months afterwards), a second mortgage was executed of the same property, for securing the sum of 500*l.*; this was in September, 1833: shortly afterwards, either in October or November following, Jordan being embarrassed in his circumstances, a proposition is made to Boulnois for the sale of the house, to which he accedes; the house is accordingly advertised for sale by auction. That circumstance being known to Messrs. Whitbread & Co., a correspondence takes place between their solicitor and Jordan. The house was sold to Mr. Whisson, who, in pursuance of the conditions of sale, paid a deposit in part of his purchase money. In this state of things, a bill is filed by Whitbread & Co. for an injunction to restrain the money from being paid over by the purchaser to Boulnois; and an injunction was granted for want of answer.

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The answer being subsequently filed, an application was made to dissolve the injunction. The question is, whether, under these circumstances, the Court ought in the present stage of the cause to dissolve the injunction. It has not been disputed, or at least it has not been disputed with effect, that an equitable mortgage may be created by a deposit of copies of court rolls. It is quite clear, that there may be an equitable mortgage of copyhold property. Boulnois did not act in this transaction

(1) 26 R. R. 49 (2 Russ. 198).
(2) 19 R. R. 625 (5 Price, 306).

(3) 29 R. R. 58 (2 Sim. 75).
(4) Lord Lyndhurst.

on his own advice; he consulted Messrs. Appleby and Charnock. Boulnois inquired of Jordan, whether the brewers had any charge on the property: Jordan stated that the property was not charged, and referred to the steward of the manor. An application was made to the steward of the manor, and he stated that there was no charge on the property. But how is this to be understood? It must be understood to mean legal charge; because an equitable mortgage would not be known to the steward, as it would not be entered on the rolls of the manor. What are the other circumstances? It is known to Boulnois, that Jordan was indebted to Messrs. Whitbread & Co. for money advanced by them. He knew also, that some personal security, at least, had been given; for Jordan had stated that they were satisfied with his promissory note. With such information, I think any prudent man would have made inquiry of Messrs. Whitbread & Co., whether they had any incumbrance on the property. But it does not rest here. Jordan was applied to for an abstract of his title: he said, I have none, but my title will be found on the rolls of the manor. Messrs. Appleby and Charnock then applied for the copies of the court rolls: he said he had mislaid them. This alone might not perhaps be sufficient; but taken in connection with the strong fact, that it was well known that Jordan was indebted to Messrs. Whitbread & Co., it ought to have put Boulnois and his solicitors on inquiry.

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It must be recollected, that I am not now deciding the *cause. It is sufficient for me at present to say, that, under the circumstances of this case, I think the injunction ought not to be dissolved.

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On this day the cause came on for hearing. * * *

The custom of brewers in London advancing money to publicans for the purposes of their trade, was admitted by the defendant Boulnois to be known to him, but he stated that he was ignorant whether such advances were made by way of legal or equitable mortgage. * * *

1835.
Feb. 12.
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Mr. Wigram and *Mr. Sharpe*, for the plaintiffs, used the same arguments, and cited the same cases as had been

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WHITEBREAD brought to the attention of the Court on the previous
 r.
 JORDAN. occasion. * * *

[319] *Mr. Simpkinson, Mr. Kindersley, and Mr. Chandless, for the*
defendant Boulnois. * * *

[321] *Mr. Bligh and Mr. Bethell, for the assignees of*
Jordan. * * *

[322] *Mr. Wigram, in reply.* * * *

Feb. 28. ALDERSON, B. :

[324] This was a case originally made by bill filed against the
 defendants Jordan and Boulnois, and afterwards by supple-
 mental bill against the present defendants and Boulnois,
 Thomas Jordan having in the interim become a bankrupt,
 praying that an account might be taken against the assignees
 of Jordan, as to the sums remaining due from them as such
 assignees to the plaintiffs; and also, that it might be declared
 that in respect of such account they might have the priority over
 [*325] any claim upon *certain copyhold premises, called the "Valiant
 Trooper," by the defendant Boulnois.

The case was very fully and ably argued before me a few
 days ago; and I have taken time to examine the facts, and
 authorities quoted, before I proceeded to give my judgment in
 the cause.

The claim of the plaintiffs depends, as regards the assignees
 of Jordan, upon the fact, whether certain documents, being
 surrenders and admittances relating to the copyhold property in
 question, were deposited with them under such circumstances
 as to give to them an available equitable mortgage on the
 property in question; and whether any thing has since occurred
 by which that equitable mortgage, if it ever existed, has been
 given up.

I take it to be well established law, that there may be an
 equitable mortgage of copyhold property, and that the deposit of
 title-deeds relating to freehold property, if made under proper
 circumstances, may amount to an equitable mortgage. The

authority of Lord ELDON, in *Ex parte Warner* (1), is full and express upon the point; and in the case of *Winter v. Lord Anson* (2), Lord LYNDBURST expressed a clear opinion to the same effect; an opinion to which in the previous motion in this individual cause he still adhered. In opposition to this, there is only a vague suggestion that a case to the contrary is supposed to have been decided by Sir JOHN LEACH, when Vice-Chancellor (3). I must doubt the accuracy of such a statement; and when I find the case itself opposed to clear and recognised authorities, proceeding, as it seems to me, on plain and clear principles, I cannot for a moment doubt which I ought to follow. In the absence of these authorities, I feel no doubt that I ought to have come to the same conclusion, referring only to the principle stated by Lord ELDON, as the ground on which Lord THURLOW's decision as *to freehold lands originally proceeded; and which, if sound, applies equally to the deposit of the title-deeds of copyhold as of freehold.

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Then if so, it is only a question of fact whether these deeds were so deposited as to give the plaintiffs an equitable mortgage on the property. It is clear, that, on the 15th of November, 1827, an advance of 2,000*l.* was made by the plaintiffs to Jordan, and that certain deeds, which did not, however, include the admittance in fee of Jordan to the copyhold estate, were deposited with Messrs. Whitbread & Co. as a security for that advance. In this, all the testimony concurs; but Jordan, who has been examined as a witness, states that the only deeds intended to be deposited were those actually deposited, and that the only interest intended to be pledged was a leasehold interest, and not the fee in the premises in question. On the other hand, the evidence for the plaintiffs goes to shew, that the agreement was for a deposit by him of all the interest which he then had in the premises, and that it was concluded that the deeds deposited were to that effect; and that on its being subsequently discovered in April, 1828, that the copy of Jordan's admission in fee was not included, it was on application to him immediately supplied, and that then a complete deposit in performance of

(1) 12 R. R. 169 (19 Ves. 202).

(3) Unreported.

(2) 27 R. R. 117 (3 Russ. 493).

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the original agreement was ultimately effected. This makes it unnecessary to advert to those cases of partial deposits of title-deeds cited in the argument. For here I apprehend that the facts shew, that the whole of the deeds, though deposited at different times, where in truth deposited under one and the same agreement, made at the time of this original advance of money by the plaintiffs to Jordan. It is clear, that, on the 21st of April, 1828, the admission of Barnett to the premises was handed over to Jordan at his request; and that, on the 28th of April, he returned it, together with the other deeds, and his own admission in fee, to the plaintiffs, by whom they have ever since been *kept. Jordan's account of this transaction appears to me to be incredible, and inconsistent with the admitted facts of the case. He is a witness, who, by his own shewing, has been guilty of something very like a fraud upon the defendant Boulnois; and his testimony therefore should be received with great caution. I think him a competent witness, but not a credible one. It seems to me, also, that his statement as to the original deposit is equally inconsistent with the real facts of the case. I cannot think it credible that Messrs. Whitbread should have ever agreed to advance 2,000*l.* on the security of any thing except the fee of the copyhold premises in question. He says, that it was on the leasehold interest. Now, at the time of the deposit, the only leasehold interest which he possessed, had expired, and was consequently of no value; and the other leasehold interest which it is suggested in argument, but not in proof, that he might have meant to deposit, was one of which he did not become possessed till some time afterwards, and when he did, it was by a purchase for less than 100*l.* I cannot believe that this could have been taken by any man in his senses as a security for an advance of 2,000*l.* On the other hand the evidence of the plaintiffs' witnesses is consistent with the probability of the case.

I have no doubt, therefore, that in this case there was a deposit of the deeds under circumstances in which the plaintiffs would be entitled to an equitable mortgage on the fee of the premises in question. Under these circumstances a part of the deeds so deposited were afterwards delivered over by the

plaintiffs to Jordan's attorney, Phillips, in 1829. This fact, to my mind, affords a strong confirmation of the accuracy of the previous conclusion at which I have arrived. But another question arises upon it, viz. whether it has at all affected the plaintiffs' claim. I think the cases cited in argument shew that it has not. For it was a delivery over to him not generally, but for a specific purpose; and the deeds were again, after that specific purpose was accomplished, returned to the plaintiffs. In addition to this, it is to be observed that the important deed, the admission in fee, was never parted with at all. This brings me to the main question in this case, which affects the defendant Boulnois alone.

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He, it seems, is possessed of a legal mortgage of these copyhold premises, to secure about 2,500*l.*, which has been executed to him since the deposit with the plaintiffs of the title-deeds by Jordan. Now it is conceded, that if he is a purchaser for valuable consideration without notice, he is entitled to priority over the equitable mortgagee. There is no doubt that, under the circumstances here disclosed, he is a purchaser for a valuable consideration; but the doubt is, whether he is a purchaser without notice.

If, indeed, by notice he meant actual notice, there is no proof of any such actual notice brought home to him. But the cases establish that constructive notice is enough. If, for instance, a party having knowledge of a deposit, avoids asking the circumstances under which such deposit was made, the Court may reasonably infer that he omitted to do so, in order to avoid having express notice; and they will in that case hold it equivalent to express notice: that was the case of *Birch v. Ellames* (1). On the other hand, the mere fact of the deeds not being forthcoming was held in *Plumbe v. Fluitt* (2) not sufficient, if unaccompanied by other circumstances, to raise such a conclusion. But I apprehend that when a party having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but, on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of those facts which, if he had used such

(1) 3 R. R. 601 (2 Anstr. 427).

(2) 3 R. R. 605 (2 Anstr. 432).

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JORDAN.

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ordinary diligence, he would readily have ascertained. He is not, indeed, bound to use extraordinary circumspection ; *nor, on the other hand, do I apprehend it to be necessary to make out express fraud on his part. If he be grossly negligent in omitting to inquire, it is at all events quite sufficient to fix him with notice ; for, as it is well laid down in 1 Equity Cases Abridged, 331, Pl. 7, the purchaser who cannot make out a title but by a deed which leads him to another fact shall be presumed cognizant thereof, for it is *crassa negligentia* that he sought not after it. Now what are the facts here ? It is clearly established, by the evidence on both sides, that it is a very general practice for persons in the situation of Jordan, being in distress for money, to deposit either with their brewer or spirit merchant, in case they are indebted to him, their title-deeds, for the purpose of giving an equitable mortgage. It is reasonable to conclude that Boulnois, a spirit merchant, was acquainted with this ; and in fact, it would appear from his own account of the transaction, that when the mortgage was talked of between himself and Jordan, he was aware of it. He knew that Jordan was indebted to the plaintiffs, and he asked him whether his property was not under mortgage to his brewers for the amount due. He knew also, from the transaction itself, that Jordan was much in want of money. The evidence of William Shenton is strong upon this part of the case, and also as to the knowledge, on the part of the defendant Boulnois, of the ordinary practice of brewers before mentioned. Now when, under these circumstances, he also found that Jordan had not possession of, or at least, that he could not produce the ordinary *indicia* of property, the title-deeds of his copyhold estates, it appears to me almost impossible to conceive how, without the grossest neglect on his part, he should have omitted to apply to the plaintiffs for information. Instead of that, however, he seems to have been contented with a reference to the manor rolls, which of course could only inform him as to any legal incumbrances on the estate ; and there is

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a laborious *inquiry into that part of the case, which, contrasted with the absolute neglect to make any inquiries in the most natural and obvious quarter, is any thing but satisfactory to my mind as to the *bona fides* of the transaction. I do not

particularly advert to the contradictory evidence as to the custom of obtaining fresh copies of admissions and of accepting titles of copyhold estates, on which much argument was employed and many witnesses examined: for whatever may be the result of this part of the case, there is no evidence at all which shews that any attorney or skilful person would, with a full knowledge of all the circumstances known to the defendant Boulnois, have omitted to make the inquiry above suggested. And, in fact, it appears, that, either from negligence or design, there was an omission on the part of Boulnois to make a full communication to his solicitor, Mr. Appleby, of this most material fact in the case. Upon the whole, I think, this is such gross negligence as would be a cloak for fraud if permitted, and that it must be held to amount to constructive notice to the defendant Boulnois of the prior equitable mortgage to the plaintiffs.

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JORDAN.

I think, therefore, that Boulnois is in no better situation than Jordan himself would be with respect to the plaintiffs' claim, and that the plaintiffs are entitled to the account they claim against the assignees of Jordan, and to priority against the claim of Boulnois. I think, also, that the decree as against Boulnois should be with costs, but as regards the assignees without costs.

— — — — —
Decree accordingly.

JOHN WHITE v. NATHANIEL GARDNER, JOHN STEVENS, AND WILLIAM INNES BAKER, CLERK.

1835.
May 11, 16, 18.

(1 Y. & C. 385—394.)

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Agreement to lease the rectorial tithes of a parish, including the tithes of 90 acres supposed to be within the parish, but which had not paid tithes to the lessor during his incumbency, with a stipulation that the intended lessee would, within a given time, take such legal proceedings for the recovery of the tithes of the 90 acres as his counsel should advise: Held, not to be within the Statute of Maintenance.

Where an equitable lessee of tithes, having a right to call for the conveyance to him of the legal interest, had neglected to do so previously to instituting a suit for the recovery of part of those tithes, and upon the refusal of the rector to join as co-plaintiff in the suit, had made him a co-defendant: Held, that he was not entitled to the costs arising from the rector's refusal to join, and that the rector was entitled to his costs.

THE bill was filed by the equitable lessee of the rectorial tithes of the parish of Lashborough, praying against *the two first-

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named defendants, who were executors of one William Gardner, an account of tithes in respect of an off-going crop upon 80 acres of land within that parish, and praying that the other defendant, the rector, might be directed to pay to the plaintiff all such costs and charges as the plaintiff had or should be put to in the prosecution of the suit, in consequence of his refusal to be joined as a co-plaintiff.

The bill stated that the plaintiff had, by virtue of annual demises (which appeared on the hearing to be parol demises) of the tithes in question, from the defendant W. I. Baker, entered into the perception and receipt thereof, or of the greater part thereof, from Michaelmas, 1824, down to Michaelmas, 1827, at which time the said W. I. Baker agreed to lease such tithes to the plaintiff for a period of three years. That a memorandum in writing was signed and executed by the said W. I. Baker and the plaintiff for that purpose, dated the 2nd of February, 1828, whereby the said W. I. Baker agreed with the plaintiff, that he by a good and sufficient indenture of lease would demise and let to the plaintiff all and every the rectorial tithes and glebe lands of and belonging to the said rectory of Lashborough, including as well the tithes of about 90 acres of land, supposed to be within the said parish, which had not since the incumbency of the said W. I. Baker paid to him any tithes or compensation for the same, as also all the glebe lands which were supposed to belong to the said rectory, and which for many years past had not been enjoyed by the rectors of the said parish, for the term of three years from Michaelmas then last, if he the said W. I. Baker should so long live and continue rector of Lashborough, at the yearly rent therein mentioned.

[*387] The agreement contained a stipulation, which did not appear in the bill, that the intended lessee should covenant to commence and prosecute within six months, if so *advised by counsel, all proper and necessary legal proceedings for the recovery of the tithes of the 90 acres of land, and also for the recovery of certain glebe lands alleged to belong to the rectory, but which were in the possession of Lord Ducie.

The bill alleged that the plaintiff was advised that the said W. I. Baker was a necessary party to the suit, and that the

plaintiff had in various ways requested him to allow his name to be used as a co-plaintiff; which the said W. I. Baker having refused to do, it became necessary to make him a defendant. * * *

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The defendant W. I. Baker, by his answer, * * alleged that he was at all times ready and willing, and had offered to concur in any receipt or discharge for the tithes now sought to be recovered; and, therefore, he submitted that his being made a party to the suit was wholly unnecessary and vexatious, more especially as he was advised that the plaintiff was competent alone to recover and give effectual discharges for what was sought by the said bill to be recovered. Wherefore he denied that he ought to pay to the plaintiff the costs demanded of him by the bill.

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Mr. Simpkinson and *Mr. Macdougall*, for the plaintiff:

* * Under the agreement, there was an implied contract that the plaintiff should be at liberty to use the rector's name.

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Mr. Wilbraham for the defendants, the executors of Gardner:

* * It is an agreement to demise the whole of the tithes, part of which have not been for years in the rector's possession. This is fatal to the plaintiff's whole case as regards the tithes claimed under the agreement.

Mr. Bethell for the defendant, the rector:

The plaintiff was not entitled to call upon the rector to join him as a co-plaintiff. * * The plaintiff ought to have called upon the defendant to grant him a lease. * * *

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Mr. Simpkinson, in reply:

With respect to the objection raised by the two first defendants, it is clear that this case has nothing to do with the Statute of Maintenance. The object of that statute was to prevent a person from selling that of which he was not in the possession. Now, the rector in that character was entitled to all the rectorial tithes. The agreement was for a lease, not of the tithes of any particular tract of land, but of all the tithes, both great and small, of the

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rectory. Then, the mere non-perception *of a portion of them cannot operate as a total disseisin of the rector. It is impossible that an agreement to lease all the rectorial tithes, where some have not been paid, should be within the statute.

In reply to the argument of the rector, it is to be observed, that no lease, if it had been immediately executed, could have given the plaintiff a legal right in the by-gone tithes. The plaintiff was satisfied with the implied contract, which always takes place in cases of this nature, which was to have the use of the assignor's name to recover the tithes in the usual manner. * * *

May 18.

ALDERSON, B.:

The question with regard to the two first defendants is, whether the plaintiff fulfils the character of equitable lessee of the tithes of the rectory of Lashborough; because it is quite clear, from the authorities, that, if he does fulfil that character, he, having made the lessor a defendant, has a right to the account which he seeks by his bill. Now, it is said, that he is not so entitled, by reason of the agreement between him and his lessor, the rector, falling within the provisions of the Statute of Maintenance. It appears that, for some years, the plaintiff held the tithes of Mr. Baker, the rector, by parol; but that in February, 1828, Baker came to a written arrangement with him to this effect—that he, Baker, would, by a good and sufficient indenture of lease, demise to the plaintiff all the rectorial tithes and glebe lands of the rectory of Lashborough, including the tithes of ninety acres of land which had not paid tithes during the rector's

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*incumbency, and also all the glebe lands which were supposed to belong to the rectory, and which for many years had not been enjoyed by the rector. The term for which the lease was to be granted was for three years from Michaelmas preceding the date of the agreement; and then there is a covenant that the plaintiff shall within six months after the commencement of the lease, if so advised by counsel, commence and prosecute legal proceedings against the occupiers of the ninety acres of land for the tithes of those lands, and also against Lord Ducie for the recovery of the glebe lands in his possession. It is said that

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this agreement falls within the Statute of Maintenance, inasmuch as it is not a mere agreement for a demise of all the glebe lands and rectorial tithes, but of certain tithes and glebe lands of which the lessor was not in possession; upon a covenant that the lessee should sue for the recovery of those tithes and lands. But it does not appear to me to fall within the provisions of that statute; for, in the first place, it does not appear from any statement in the bill that the rector was out of possession of the tithes of those lands. He must be considered as being rightfully in possession of the tithes of all lands within the parish. He lets all the tithes; and all that is stated is, that he has not received tithes of those ninety acres. But that may be by reason either of a composition, or of neglect on the part of the rector to receive or enforce the payment of them. It does not follow from the circumstance stated that he is out of possession of them; he being in possession of them generally. Besides which, all that the lessee undertakes to do, is to bring such actions for the recovery of those tithes and lands as his counsel shall advise. It is, therefore, not to be presumed that he will be advised to bring any actions which by law he is not entitled to bring. In addition to this, the observation in Co. Litt. 369 b, seems applicable to the present case. It is there said, that “the words of the statute being any pretended right, therefore a lease for years is within the statute. But yet, if a man make a lease for years to another, to the intent to try the title in *ejectione firmæ*, that is out of the statute, because it is in a kind of course of law; but if it be made to a great man, or any other, to sway or countenance the cause, that is within the statute.” Upon the whole, therefore, it appears to me that this agreement is not within the statute, and that the right of the plaintiff to the tithes for the away-going crop being in other respects established, he is entitled to a decree.

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It was contended on the part of the plaintiff, that the defendant Baker ought to pay him the costs which he had been put to in making Baker a defendant instead of a plaintiff. On the other hand it was contended, that being made a defendant solely for the purpose of establishing the plaintiff's claim, Baker must be paid his costs. Now, it appears to me that the question depends

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on this consideration—whether there was any agreement expressed or implied between Baker and White, that Baker should permit the use of his name as co-plaintiff. If there was any such agreement either expressed or necessarily implied, then White is entitled to succeed; but if there was no such agreement, then Baker is entitled to his costs of being brought before the Court. Now, it is clear to me, that there was no express understanding on the part of Baker to permit his name to be used, nor any necessary implication to that effect; because all that the agreement amounts to is, that Baker will, at the request of White, execute to him a legal instrument, giving him a legal claim. It was White's fault that he did not get the agreement put into a legal shape before he commenced the suit. If he had so done, there would have been no necessity for making Baker a party at all. If he had not so done, but had made his claim upon Baker to execute the lease, and that claim had been neglected or refused, then he would have been entitled to place Baker in the situation *of plaintiff. Further, if he had entered into this agreement, and there was no other mode of obtaining redress, then there would have been a necessary implication that Baker agreed to be made a plaintiff. But when I find that by the practice of courts of equity he may obtain redress by making the rector either plaintiff or defendant, this appears to me to put an end to any necessary implication, that, under such an agreement as this, the rector was bound to lend his name as a plaintiff. Therefore I think that, though the defendant Baker has not altogether put his refusal to join in the suit on the right ground, because he seeks for a further payment from the plaintiff beyond the indemnity; yet, as he has not necessarily agreed to permit his name to be used as co-plaintiff, he is entitled to his costs.

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ESDAILE *v.* LA NAUZE (1).

(1 Y. & C. 394—401; S. C. 4 L. J. (N. S.) Ex. Eq. 46.)

1835.
May 29.
June 15.

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Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a court of equity will restrain even a *bonâ fide* holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled.

Where the original indorsement of the payee's name on a bill of exchange is a forgery, a real indorsement by the payee, after the bill has arrived at maturity, will not give the holder any title.

A power of attorney giving the agent full powers as to the management of certain specified real property, with general words extending those powers to all the property of the principal of every description, and, in conclusion, authorizing the agent to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever, does not authorize the agent to indorse bills of exchange in the name of his principal.

LANGFORD HEYLAND, Esq., by a power of attorney, dated the 27th of August, 1830, authorized Robert Hitchcock to oversee, let, manage, and improve his several estates in Ireland, specifying them by name, and every other property belonging to him, where-soever situate, or of whatsoever description, or howsoever called or known; and for the purposes aforesaid, in the name of his principal, to execute agreements and leases, to receive and distrain for rents, to give acquittances of every description, and to bring actions and suits at his discretion for the recovery of rents, or any other debt, duty, matter, or thing due or coming to his principal for or in respect of *the premises, or in any other respect whatever. "And, in my name, to give, and further to do all lawful acts and things whatsoever concerning all my business and affairs of what nature or kind soever in the said United Kingdom; and generally to act for me and on my behalf in all matters as fully and amply in all respects as I might or could do therein, were I personally present and had done the same."

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In pursuance of this power of attorney, Hitchcock became the manager and receiver of Heyland's estates in Ireland; and in the course of his dealings in that character, he was in the habit of making remittances to Heyland by bills of exchange,

(1) See now the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 24 and 34 (2) (c).

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drawn by St. George Gregg & Co., bankers at Dublin, upon and accepted by the plaintiffs, who are bankers in London. He was also, as such agent, in the habit of making lodgments of money with Gregg & Co.; but at the time when the bill in question in this cause was drawn, Gregg & Co. had no effects in their hands belonging either to Heyland or to his agents.

In March, 1832, Hitchcock sent Gregg & Co. a letter containing a banker's cheque for 500*l.*, drawn upon the Coleraine branch of the Provincial Bank of Ireland, accompanied with a request, that, in consideration of such cheque, Gregg & Co. would draw a bill on London for the sum of 500*l.* in favour of Heyland. Accordingly, in compliance with that request, Gregg & Co. drew a bill of exchange for 500*l.* upon the plaintiffs, dated the 10th of March, 1832, payable to Heyland, or his order, at sixty-one days after sight, which they delivered to Hitchcock's clerk, retaining in their hands the cheque drawn upon the Coleraine Bank.

[*396] Immediately upon the receipt of the bill, Hitchcock indorsed it in the name of Heyland to one Stewart, who, on the 12th of March, sold it to the defendant, La Nauze, a bill broker, for 492*l.*, and afterwards left the country. It was *admitted that La Nauze had no notice of the fraud. Upon the purchase of the bill, he immediately sent it to the plaintiffs for acceptance, and they accordingly accepted and returned it.

Upon presentment of the cheque for 500*l.* for payment at the Coleraine Bank, payment was refused, and it was then found that the cheque was a nullity, and that Hitchcock had absconded to America. In April, 1832, Gregg & Co. became bankrupt, being indebted to the plaintiffs in a large balance over and above the amount of the bill.

After the bill arrived at maturity, which was on the 17th of May, the defendant, La Nauze, was for the first time apprized of the fraud. Having failed in his applications to the plaintiffs to pay the bill, he was advised to get the bill indorsed in reality by Heyland, who, during the whole of these transactions, was abroad. Heyland accordingly did so, in consideration of being paid one-half of the amount of the sum to be received upon the bill. La Nauze then brought his action against the plaintiffs to

recover the amount; and the present bill was, consequently, filed against him and Heyland (who was still out of the jurisdiction), praying to have the bill delivered up to be cancelled, and for an injunction to restrain the action.

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The plaintiffs having obtained an injunction to restrain the action at law, that injunction was, after argument before Lord Lyndhurst, continued to the hearing.

The cause now came on to be heard upon the admissions of both parties. On behalf of the plaintiffs a letter was read which had been written to them by the defendant Heyland, in which he stated that Hitchcock, by indorsing the bill in his name, had committed a forgery.

Mr. Hayter and Mr. L. Wigram, for the plaintiffs:

* * La Nauze had no legal title to the bill at the time it arrived at maturity. The letter of Heyland shews that the first indorsement of his name was a forgery. Now, however, that there is an arrangement between La Nauze and Heyland, they are silent as to the forgery, and resort to the power of attorney, in order to shew that Hitchcock was authorized to sign bills in Heyland's name. The setting up the power of attorney was only an after-thought. At all events, there is nothing in the instrument itself which authorizes the agent to sign bills of exchange. * * *

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Mr. Simpkinson and Mr. G. Richards, for the defendant La Nauze:

* * Here the defendant was a purchaser for a valuable consideration without notice of the fraud, and the second indorsement cannot affect his title in that character. The acceptors in this case must be liable to the loss. They accepted the bill on the credit of Gregg & Co. Their acceptance implies that they had effects of Gregg & Co. in their hands sufficient to answer the amount, and they cannot now say that they had no such effects. At all events, the equity of the defendant is equal to that of the plaintiffs.

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Mr. Hayter, in reply.

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ALDERSON, B. :

LA NAUZE.

June 15.

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The facts of the case, as stated by the mutual admissions of both parties, are these. On the 9th March, 1832, Robert Hitchcock, jun., who was the agent *of the defendant Heyland, under a power of attorney, the terms of which I shall presently advert to, wrote to St. George Gregg & Co., the drawers of the bill of exchange now in dispute, the following letter. [His Lordship then read the letter.] In pursuance of this letter, the bill now in question was drawn by St. George Gregg & Co., on the plaintiffs, bankers in England, and given to Hitchcock. As soon as he got possession of it, he put upon it the indorsement of the name of Heyland, in favour of whom it was drawn, who was then absent from Ireland, and caused it to be put in circulation through a person of the name of Stewart, before it could be possible for Gregg & Co. to be aware of the dishonour of the Coleraine cheque, or to take any measure to prevent the acceptance of the bill by the now plaintiffs in equity. The defendant La Nauze, on the 12th, became the purchaser of this bill, without any knowledge of the fraud, or suspicion of the genuineness of the indorsement, and paid full value for it. As soon as the bill had been thus put into circulation, it was transmitted for acceptance, and duly accepted by the plaintiffs. On sending, however, the cheque mentioned in the letter of the 9th March to Coleraine, it was dishonoured; and as to this part of the case, I entirely adopt the view taken of it by Lord LYNDEHURST. It seems to me to have been a fraudulent contrivance by which Hitchcock obtained for his own use the amount of the bill in question. Subsequently to the bill becoming due, the defendant La Nauze, who had then discovered the fraud and contrivance which had been practised, and who was apprized of the doubt as to the validity of the original indorsement, procured another and a real indorsement from Heyland, on the terms of equal division of the amount to be obtained from Messrs. Esdale & Co. La Nauze having afterwards brought an action at law, this bill has been filed.

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The first objection to it is, that there is no ground for interference in equity, because La Nauze is a *bonâ fide* *holder for value. If this were so, the authorities cited in the argument

would lead me to think that the bill ought to be dismissed. But there is a fallacy in so considering him. It is not disputed that the plaintiffs would be entitled to redress in equity as against Hitchcock, the person by whom the fraud was accomplished, or Heyland, who is the same as Hitchcock for this purpose, being the principal on whose behalf Hitchcock appeared to act. And though a defence at law might be made under these circumstances, still fraud is equally cognizable in equity and the subject of relief. But here, although La Nauze is in the possession of the bill, having paid value for it, yet if the indorsement under which he received it is a forgery, it is the same as if there were no indorsement at all; and then he is not, in truth, the holder of it, for he has no title by indorsement, the only way by which he could obtain a title to this bill.

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So it stands as to the indorsement originally written on the bill, unless, indeed, Hitchcock, who wrote it, had authority under the letter of attorney to indorse bills for Heyland. But looking at that instrument, I am clearly of opinion that it confers no such power. The general words are not sufficient, for they must be construed with reference to the antecedent matter, which states the purpose for which the letter of attorney was given. Perhaps they would be sufficient to confer all powers not specifically enumerated, but necessary to carry the principal purpose of the letter of attorney into effect.

But a power to indorse bills is not necessary, and being in truth an almost unlimited authority to pledge the credit of Heyland, it would be very dangerous to infer it, unless the power were very clearly to be inferred, or expressly given. Neither of these circumstances occur here. Whether the letter of attorney, and the generality of its phraseology, be sufficient to excuse Hitchcock, if criminally indicted, on the ground that he may *bonâ fide* have believed *he had such a power, I do not presume to decide. That would be a question for the jury. I think, therefore, that in fact this first indorsement was in truth no indorsement, and consequently that it does not confer on La Nauze the privilege of a *bonâ fide* transferee of the bill for value. Nor does the subsequent indorsement alter the case. That was made after the bill was over-due, and the plaintiffs, as against

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La Nauze, claiming under that indorsement, would have all the equities they could have as against Heyland.

Upon the whole, I think the plaintiffs entitled to the relief they claim. But as I am satisfied that La Nauze is equally with them a victim of the fraud of Hitchcock, I think the decree for the plaintiffs should not be accompanied with any decree against him for costs. Let the plaintiffs, therefore, have a decree in the terms they pray for, but let each party pay their own costs (1).

Decree accordingly.

1835.
May 16, 18.
July 13.

HIPWELL v. KNIGHT (2).

(1 Y. & C. 401—420; S. C. 4 L. J. (N. S.) Ex. Eq. 52.)

[401]

Time will, in equity, be deemed of the essence of the contract, in all cases where it can be collected from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. But, where, upon an agreement for the purchase of an estate, the parties entered into a stipulation that an abstract of title should be delivered immediately, and that, in case the contract was not completed by a given day, the purchaser should be released from his contract, and the abstract was not immediately delivered, but communications on the subject of the title were continued between the parties until the time limited by the contract had expired: Held, that, under these circumstances, the benefit of the stipulation as to time was waived by the purchaser.

Where a person had contracted for the purchase of an estate from trustees under a deed of release and assignment for the benefit of the creditors of a trader, upon a stipulation that a good title should be made by a given day, and that day fell within the period during which a fiat in bankruptcy might have issued against the trader: Held, that he was in the situation of a purchaser who had waived a stipulation that time should be of the essence of the contract.

Where parties contract that the purchase of lands should be completed within so many months, the question whether calendar or lunar months were intended may depend on the subsequent conduct of the parties.

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WILLIAM POOL, of Steventon, in the county of Bedford, baker and farmer, being indebted to the plaintiffs *and other persons, by indentures of lease and release and assignment, dated respectively the 7th and 8th days of September, 1832, but which were not gazetted pursuant to the provisions of the stat. 6 Geo. IV. c. 16, s. 4, conveyed all his real and personal property to the

(1) See *Mead v. Young*, 2 R. R. 314 C. P. D. 342, 46 L. J. C. P. 537, (4 T. R. 28). 36 L. T. 738.

(2) *Patrick v. Milner* (1877) 2

plaintiffs, upon trust to sell the same absolutely, and to apply the proceeds for the equal benefit of his creditors.

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In pursuance of these trusts, the plaintiffs caused certain freehold and copyhold premises belonging to Pool to be put up to auction on the 31st of October, 1832, in fifteen lots, subject to certain conditions of sale. By the third of these conditions, each purchaser was immediately to pay a deposit of 20*l.* per cent. on his purchase-money into the hands of Mr. Eagles, the vendor's solicitor, and to sign an agreement for paying the remainder on the 6th of January following, when the purchase was to be completed; and if the completion of the purchase were delayed by any cause whatever beyond the 6th of January, the vendors were to be entitled to interest after the rate of 5*l.* per cent. for the remainder of the purchase-money.

The sale took place, and the defendant, by his agent Thomas Knight, was declared the purchaser of lots 1, 2, 8, and 15, for the sum of 3,085*l.* Thomas Knight thereupon signed an agreement for the payment of 617*l.*, as a deposit, upon a given day, and of the remainder of the purchase-money on the 6th of January following. The defendant soon afterwards took possession of the three first-mentioned lots, and demised them to Thomas Knight, who planted an orchard upon them, and exercised various other acts of ownership.

On the 6th of January, 1833, the day appointed for the completion of the purchase, no abstract of the title had been delivered to the defendant. A correspondence then took place between the solicitors of both parties, in the course of which, and particularly by letters dated the 7th and 19th of March, the solicitors for the defendant *threatened to abandon the contract, and insisted that, at all events, as the purchase was not completed on the 6th of January, their client ought not to pay the interest which had been stipulated to be paid from that day. In consequence of this correspondence, an interview between the solicitors of both parties took place on the 23rd of March, on which occasion a fresh agreement was drawn up and signed by them, in the following terms:

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"Memorandum of an agreement, made and entered into the 23rd of March, 1833, between, &c. Whereas John Knight, of

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Harrold, gentleman, by his agent, Thomas Knight, lately purchased by public auction lots 1, 2, 8, and 15 of certain estates at Steventon, belonging to the assignees of Mr. William Pool, the purchase of which was to have been completed, under the conditions of sale, on the 6th day of January last, and the said John Knight paid the sum of 617*l.*, exclusive of the auction duty, on account of the purchase-money, amounting to 3,085*l.*; and whereas the said John Knight entered into possession of the said purchased premises, but hath not yet completed his purchase, no abstract of title having been yet delivered to him or to his solicitor; and whereas the said John Knight is now ready to complete his purchase, it is agreed as follows: That an abstract of title shall be immediately delivered, and a good title made according and subject to the conditions within four months from the date hereof. That at that period, or sooner, if the title is completed, the purchase-money shall be paid. That with respect to a sum of 2,000*l.*, part of the said purchase-money, no interest whatever shall be paid thereon from this time; and as to the remainder of the said purchase-money, 4*l.* 10*s.* per cent. only shall be allowed from this time. That if the title shall not be perfected within the time aforesaid, the said John Knight shall be released from his contract; and instead of the said John Knight receiving from his brother Thomas Knight, or whosoever may be in the occupation *of the said premises, the rents and profits thereof, the vendors shall receive them; the said John Knight hereby guaranteeing that the rents shall be paid from the time of possession being taken, until Michaelmas next. That if the title shall not be completed as aforesaid, the deposit money and auction duty shall be returned to the said John Knight, with interest, as is usually allowed in such cases. That the said John Knight shall, if requested, join the vendors in giving a notice to the said Thomas Knight to quit the premises at the expiration of his current year tenancy, or holding thereof; it being understood that the said John Knight shall not be under any obligation to compel the said Thomas Knight to quit the premises, although he will concur in any act which may be thought necessary for that purpose at the request of the vendors, and at their expense. That the said John Knight will, at the

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request of the vendors, or their solicitor, invest the said sum of 2,000*l.*, either in Exchequer bills or on such other Government securities as may be thought advisable, the vendors indemnifying the said John Knight from any loss in case the title should not be perfected, and allowing him 4*l.* per cent. on the money."

On the 30th of March, an abstract of title to part of the premises was furnished to the defendant's solicitor, and on the 13th of April, at their request, an abstract of title of the remaining part was sent to them. On the 18th these were returned with several observations and requisitions on the part of the defendant's solicitors, who considered the title very imperfect. From that day till the 21st of July communications took place between both parties relative to the title; the solicitors for the defendant complaining that the abstract, and further abstracts, sent, were not satisfactory. There were expressions contained in the letters of both parties, shewing that they considered that the time for completing the contract was drawing to an end. On the 21st of July the last abstracts *were sent, and on the 23rd of July, being the day fixed for the completion of the contract, the defendant's solicitors returned the abstracts, with some further observations and requisitions. On the same day, however, formal notice was given in writing to the plaintiffs, and their solicitor, that the contract was abandoned by the defendant. On the 25th of July the solicitors for the defendant wrote to the plaintiff's solicitor as follows: "We cannot but express our surprise that our first requisitions should have met with such little attention, and that after we had repeated them, we should, at the eleventh hour, indeed only the day before the expiration of the four months, have a further additional abstract of thirty-seven sheets. We have, as far as time would allow, observed upon the answers of the vendor's solicitor. We do not intend to confine ourselves to those objections only which we have already made upon the title, but reserve the right of making any other which may present themselves, if circumstances should render it necessary."

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The plaintiffs filed their bill for specific performance of the foregoing agreements, so far as related to lots 1, 2, and 8; offering to rescind the contract as to lot 15, as to which they

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admitted that a good title could not be made. They charged that they could make a good and marketable title to the three first-mentioned lots. That time never was of the essence of the contract, and that no damage or injury had been sustained by the defendant, by the non-completion thereof at the precise time specified; and moreover, that a good and marketable title was made out by the plaintiffs to the said three lots within the time stipulated by the second agreement. That any objection to the title which might be raised on the ground that the release and assignment of the 8th of September, 1832, had not been gazetted, had been waived by the defendant.

The cause now came on for hearing.

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On behalf of the plaintiffs, the evidence of their solicitor *Mr. Eagles was read. With reference to the charge in the bill, that time was not of the essence of the contract, this witness stated that when the abstracts were sent by him on the 21st of July, as before mentioned, to the defendant's solicitor, they were accompanied with observations, and a marginal note in the deponent's handwriting; that no notice was taken of these by the defendant's solicitor, but that further requisitions as to the title were made and demanded of the deponent at the time of the return of the abstracts, which he stated to be on the 26th of July, and consequently the deponent did not consider that the abstracts were returned to him as upon the termination of the contracts.

With reference to the alleged waiver by the defendant of the defect in the title, arising from not gazetting the release and assignment, the same witness stated that at the meeting at which the second agreement was drawn up, Mr. Burnham, the defendant's solicitor, inquired whether the assignment had been gazetted, to which the deponent replied that it had not, but that the defect might be supplied by an affidavit by Mr. Pool, that all his creditors who could by possibility make him a bankrupt had executed the assignment. That Mr. Burnham replied, that it would have been better had the assignment been gazetted, as it would have avoided any question. That the deponent explained that the omission had arisen from the hurry of business occasioned by the elections, which took place at that time. That upon this explanation, Mr. Burnham proceeded to draw up the

agreement, mentioning three months for the completion of the purchase, which was afterwards altered to four months.

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On the part of the defendant, the evidence of Mr. Burnham, one of his solicitors, was read. Upon the question of time, this witness stated that at the interview between him and Mr. Eagles, the deponent asked Eagles *how long it would take to make out the title and complete the contract, with a view to having the time limited in the contract. That Eagles answered that the title was perfectly good, and that three months was sufficient. That the deponent thereupon prepared the contract accordingly; but that before or during the preparation thereof, he gave Eagles to understand that if the purchase was not completed within the time to be limited by the agreement, the defendant should be considered at liberty to abandon the agreement. That the deponent afterwards told Eagles that if he had any doubt about three months not being long enough, he had better take another month. That Eagles acceded to the deponent's offer, and altered the contract accordingly, by striking out the word "three," and substituting the word "four."

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With respect to the assignment, this witness denied that he, or, as he believed, any other person at the time of drawing up the agreement of the 23rd of March, 1833, undertook or promised to accept any affidavit by Pool, or any other person, as a waiver or abandonment of any objection to the title to the premises founded upon the circumstance of the indentures of the 7th and 8th of September, 1832, being an act of bankruptcy on the part of Pool.

Mr. Jervis, Mr. Simpinkson, and Mr. Hayter, for the plaintiffs :

First, time was not of the essence of the contract. * * *

Secondly, the objection that time was the essence of the contract, has been waived by the conduct of the defendant. The time limited by the agreement was four months, and there being nothing from which the Court can infer that the parties meant the contrary, the time must be calculated according to lunar and not calendar months. * * Calculating, however, by calendar months, the abstracts were not returned till the 23rd

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of July, and even then the defendant's solicitors do not insist on the expiration of the time, but make additional observations on the abstracts, and express an intention "to reserve to themselves the right of making any other objections, should circumstances render it necessary." * * A strict construction of contracts, with reference to time, can only be supported in equity in cases of a special nature, as where the lease of a house, or an annuity, is the subject of contract: *Withy v. Cottle* (1); *Doloret v. Rothschild* (2) [*Seton v. Slade* (3)].

Thirdly, a good title was shewn within the limited time, and though under the Bankrupt Act, the execution of the indentures of September, 1832, ought to have been gazetted, yet that objection was waived by the defendant's solicitor consenting to receive the affidavit of Pool; and now the lapse of time has conferred a good title, notwithstanding the statute.

As regards lot 15, the plaintiffs are willing that the defendant should be released from his contract; but inasmuch as the possession of that lot is not essential to the enjoyment of the others, the circumstance that a good title cannot be made to it, does not enable the defendant to put an end to the contract as to the other lots: *Poole v. Shergold* (4).

Mr. Boteler, Mr. Temple, and Mr. Daniel, for the defendant:

Time may in equity be made of the essence of the contract in three ways; namely, by considerations arising either from the nature of the property, or the *laches* of the parties, or express agreement. * *

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(ALDERSON, B.: Is there any case where time is impliedly made of the essence of the contract? In *Seton v. Slade*, Lord ELDON seems to question whether the specific intention of the parties is not controlled by what the equitable construction of their intention ought to be. The cases turn not so much on the general intention of the parties as to time, but on whether they intended, in the technical sense, that time should be of the

(1) 23 R. R. 187 (T. & R. 78).

(3) 6 R. R. 124 (7 Ves. 265).

(2) 24 R. R. 243 (1 Sim. & St.
596).

(4) 1 R. R. 37 (1 Cox, 160; 2 Br.
C. C. 118).

essence of the contract. If you and I agree to do a certain thing on a given day, that is clearly our intention, but is that of the essence of the contract in a court of equity?)

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It is apprehended that it is so now in equity. * * *Williams v. Edwards* (1) completely meets the present case.

But then it is said that the stipulation as to time has been waived by the defendant. * * The parties understood throughout their proceedings that the time would expire on the 23rd; and on that day the abstracts were returned, and notice given of the abandonment of the contract. It is attempted to be said, that the defendant agreed to waive the objection that the assignment had not been gazetted, and to accept Pool's affidavit, that he had no debts upon which a fiat could issue. But the plaintiffs do not and cannot prove that the defendant *agreed to accept such an affidavit; and even if he had so agreed, it would not have cured the defect in the title: *Lowes v. Lush* (2).

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Mr. Jervis, in reply :

No doubt time may be of the essence of the contract in equity as well as at law. The question is, whether it was the essence of this contract. In ascertaining this question, your Lordship will not look to the terms of the contract alone, for that will be doing nothing in a court of equity, but to all the circumstances of the case. Here it is to be remembered that the defendant entered into possession of the premises, altered the boundaries, cut down trees, and let the property to his brother, who planted an orchard, and made other alterations. These circumstances must be taken into consideration in dealing with the second contract. Taking them in connexion with the contract itself, it is clear that time was not of the essence of it. * * *

ALDERSON, B. :

It is clear that if the title depended *on being completed on the 23rd of July, no title to the property was or could be made

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(1) 29 R. R. 61 (2 Sim. 78).

(2) 9 R. R. 344 (14 Ves. 547).

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out on that day. There is no evidence that the defendant agreed to take the affidavit of Pool that all his principal creditors had executed the assignment, and the case which has been cited decides that a party is not bound to take a title so situated. There is nothing to shew that Mr. Burnham agreed to accept that title; and it ought to be a strong case to shew that a party on the part of his client agreed to waive a clear objection to the title. The question whether time was of the essence of this contract, appears to me a nice and difficult question to decide; and I am the more disposed to think so, when I find that in *Seton v. Slade*, Lord ELDON, with his profound legal attainments, says, that if he were required to express himself with great accuracy upon the principle involved in a variety of cases on this subject, it would be necessary for him to look into those cases. If, therefore, I shall be called upon to lay down any general rule of equity upon this question, *à multo fortiori* must I take time to peruse and consider the authorities.

July 13.

ALDERSON, B. :

This was a bill filed by the plaintiffs, who are assignees of William Pool, a bankrupt, for the specific performance of a contract of purchase entered into by him with them. The original contract was dated 31st October, 1832, the defendant having purchased at the auction of the bankrupt's lands, three lots, viz. Nos. 1, 2, and 8, the property of the bankrupt, and No. 15, being the property of the bankrupt's brother, Thomas Pool, and included in the same auction.

We may begin by laying all question as to No. 15 aside, by the mutual admissions of both parties. As to the other three lots, one of the stipulations at the auction was, that a good title should be made on the 6th day of January following. Under this agreement the defendant entered *into possession, and let the lands to his brother, Thomas Knight, at a yearly rent, cut down some trees, and exercised various acts of ownership upon the property.

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It is not disputed that time was not of the essence of this contract, and that, independently of the defendant's acts before enumerated, the omission to make out a good title on or

before the 6th day of January, 1833, would have been no defence to the present suit, although at law it would have been a breach of the contract between the parties. But the present suit is resisted on grounds subsequently arising. From the correspondence between the solicitors, it appears that Messrs. Burnham & Co., acting for the defendants, had pressed Mr. Eagles, who acted for the plaintiffs, for the delivery of the abstract of their title; and by a letter dated the 19th day of March, repeated the threat originally made by a letter dated March the 7th, that unless prompt measures were taken for completing the title, the defendant would throw up his purchase. Under these circumstances the parties met, and entered into the agreement dated the 23rd of March, 1833, upon which, in truth, the whole question now turns.

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Now, the first question is, whether time is of the essence of this agreement. After examining with as much attention as I can the various cases brought before me during the argument, it seems to me to be the result of them all that a court of equity is to be governed by this principle—it is to examine the contract, not merely as a court of law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect. But, in so doing, I should think it prudent, in the first place, to look carefully at what the parties have expressed, because, in general, they must be taken to express what they intend; and the burden ought, in good reason, to be thrown on those who assert the contrary.

In the case of a mortgage, however, which I use rather for the purpose of illustrating the principle than as at all parallel to the present case, the Court looking at the real contract, which is a pledge of the estate for a debt, treats the time mentioned in the mortgage deed as only a formal part of it, and decrees accordingly, taking it to be clear, that the general intention should override the words of the particular stipulation. So, in the ordinary case of the purchase of an estate, and the fixing a particular day for the completion of the title, the Court seems to have considered that the general object being only the sale of the estate for a given sum, the particular day named is

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merely formal, and the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case and the nature of the title to be made. But this is but a corollary from the general proposition, which is, that the real contract, and all the stipulations really intended to be complied with literally, shall be carried into effect.

We must take care, however, that we do not mistake the corollary for the original proposition. If, therefore, the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract, and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of the sale of stock, and of a reversion, are instances of this. So also, if it appear that the object of one party, known to the other, was, that the property should be conveyed on or before a given period, as the case of a house for residence or the like. I do not see, therefore, why, if the parties choose even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a court of equity. That is the real contract; the parties had a right to make it; why then should a court of equity interfere to make a *new contract which the parties have not made? It seems to me, therefore, that the conclusion at which Sir Edward Sugden, in his valuable treatise on this subject, has arrived, is founded in law and good sense.

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The only question, then, is to apply the test to the present case. Here the agreement of the 23rd of March arose out of a complaint of delay in completing the title. The agreement provided first that an abstract should be immediately delivered, and adds that a good title shall be made within four months from the date thereof. Then follows a stipulation for the payment of the residue of the purchase-money at the time the title is completed; and another stipulation relieving the defendant from the payment of interest in the mean time upon 2,000*l.*, which was in fact the greater part of the money remaining unpaid. If it had stopped here, the case would have

been quite clear. I should have considered the time only formal, and the real contract, the relieving the defendant from payment of this interest during the reasonable delay necessary to complete the title. But the next stipulations are very important. They provide, first, that if the title be not completed within the fixed time, the defendant shall be released from this contract, and go on to stipulate as to the situation of the parties in that event, viz. that the vendors shall receive the whole rents of the premises from the tenant, for whose solvency, up to Michaelmas following, the defendant becomes guarantee, and that the deposit-money and auction duty shall be returned by the vendors to him with interest, and that, if required, he shall join them in giving a notice to quit to the tenant in possession.

I own that I cannot reconcile these stipulations with any other supposition than that both parties intended to fix a time for completing the contract, which was intended by them to be literally complied with. There is nothing inconsistent with this supposition in the admitted fact of *the change of the time from three months, as originally drawn, to four months, as it now stands. For the only question is, whether a fixed time was intended to be part of the agreement. Indeed I think this fact tends rather to confirm the supposition that time was intended to be of the essence of the contract : for, if not, it would have been almost immaterial whether the particular time named was three or four months, and probably no alteration would have been made. But if it were intended to be of the essence, then it would be material for the party who was to be bound by it to have the time for completing the contract as extensive as possible. I am, therefore, inclined to be of opinion, that time was of the essence of this agreement.

But it is not necessary to give a decisive judgment on this point, inasmuch as I think that if it were so, still the stipulation has been waived. The result of the cases on this subject seems undoubtedly to be, that slight circumstances are sufficient in a court of equity to prevent a party from taking the benefit of such a stipulation ; and that wherever a party has done any act inconsistent with the supposition that he continues to hold his opponent strictly to this part of his agreement, he is to be taken to have waived it altogether.

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The circumstances in *Seton v. Slade*, in which Lord ELDON held the stipulation to have been clearly waived, were of this description : the defendant, who had intimated, at a very early period of the transaction, his intention of requiring the contract to be completed by a given day, had nevertheless received, without objection, the abstract, and retained it till the expiration of the term ; and yet, though he sent it back at the expiration of the period, and forthwith did all in his power to put an end to the contract, Lord ELDON held that his receiving the abstract without objection at a time when it was clear that the title could not be completed within the specific period, was a waiver of that stipulation.

[419] Here the defendant received the abstract at a time when, as it seems to me, it was impossible for the title to have been completed within the period limited. For according to the evidence, there was no possibility of making a good title, at all events, till the expiration of a twelvemonth from the execution of the assignment from Pool to the plaintiffs. The defendant's solicitor knew then that this assignment had not been gazetted, and according to his evidence, upon which I must act, there was no agreement for any affidavit of the assent of all material creditors as an equivalent for this omission. He ought, therefore, to have refused to accept the abstract, or to have sent it back forthwith. Instead of that, he keeps it to the last, and sends it back with observations, from which I should have concluded that the title was still open to further explanation, and more satisfactory proof. And even after this, on the 25th of July, the letter reserving a right to make further objections is written by the defendant's solicitors, and sent to the plaintiff's.

Upon the whole, therefore, I think that this case is like *Seton v. Slade*, and that the stipulation as to time has been waived by the conduct of the parties, and that I ought to decree that the plaintiffs are entitled to relief, in case they are able now to make a good title. I do not go on the ground that the time limited must be taken to be lunar months. It seems to me that that argument is not well founded.

It must be referred to the Master to examine and report whether the plaintiffs can now make a good title to the premises ;

and if they can, there must be a decree for a specific performance of the agreement. I think the Master must not, in that examination, allow any affidavit or proof of the assent of all creditors who could sue out a commission of bankruptcy, to be produced as a substitute for the non-gazetting of the deed of assignment by Pool to the plaintiffs. But if the mere lapse of time will be sufficient to cure that defect, that will be proper for him *to take into consideration. At present I do not give any opinion on that point. The question of costs must of course be reserved.

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BERRINGTON v. EVANS (1).

(1 Y. & C. 434—440).

1835,
June 16.

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Where a judgment creditor had allowed 20 years to elapse without taking steps to recover his debt, and then ascertained that during the 20 years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in Court available for the payment of the remainder: Held, that he was barred by the Statute of Limitations from proving his debt before the Master, and receiving payment rateably with the other creditors.

In this case the bill was filed by the plaintiffs on behalf of themselves, and all other the specialty creditors of the late Sir Watkin Lewes, who died intestate, praying the usual relief. By the decree made on the hearing of the cause, on the 9th of December, 1821, it was referred to the Master to take an account of the specialty debts of the intestate, and also of his personal estate: and in case that was not sufficient for payment of those debts, then to take an account of his real estates, &c. And the Master was directed to publish advertisements in the *London Gazette*, and other newspapers, for the purpose of giving notice to such specialty creditors to come in before him and prove their respective debts, by a day to be appointed for that purpose, and in default thereof, the said specialty creditors were to be excluded the benefit of the said decree.

The Master, by his report, dated the 21st of June, 1830, certified that he found that the intestate was at the time of his

(1) The statutory period is now reduced to 12 years by 37 & 38 Vict. c. 57, s. 8.

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death indebted to sundry persons on judgments and other specialties. That the usual advertisements had been inserted in the *Gazette* and other newspapers, which he mentioned, by which the specialty creditors were required to come in before him, and prove their debts by a given day. That the appointed day had expired, and that no person had appeared to prove any such debt, except the persons named in the schedule to his *report. He therefore did not find that any specialty debts except those mentioned, remained due to the intestate's estate.

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By the decree made on further directions on the 16th of February, 1831, the Master's report was confirmed, and he was directed to tax all parties their costs, to be paid out of the money in Court, and to apportion the balance rateably amongst the specialty creditors. By a further report, dated the 7th of April, 1831, the Master certified that he had pursued these directions.

A petition in the cause, supported by affidavit, was now presented by John Kemp, who had not appeared before the Master, alleging that he was a creditor of Sir Watkin Lewes, under a judgment entered up by virtue of a warrant of attorney, dated the 2nd of January, 1813. That the debt in question had been also secured by the bond of the daughter of Sir Watkin Lewes, conditioned for payment of the money after her father's death. That she died in the lifetime of her father, whereby the bond became void. That the petitioner believing that Sir Watkin Lewes had only a life interest in his estates, considered that the debt had been wholly lost, until lately informed by his solicitor of the proceedings which had taken place in the cause. That the petitioner had not seen any of the advertisements which had been published by the Master, and was, until lately, entirely ignorant of his right.

The petition, after alleging that a considerable sum of money on account of the intestate's property had been paid into Court since the report of the 7th of April, 1831, prayed that the petitioner might be at liberty under the decree of the 9th of December, 1821, to go in and prove his debt before the Master, and might be paid his debt rateably with the other creditors, out of the interest and dividends of the money now in Court.

Mr. Spurrier, for the petition :

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* * It will be contended that, under the late statute (1), the petitioner is too late in his application ; but that statute does not alter the rule of relation which has been adopted by courts of equity in these cases. In *Sterndale v. Hankinson* (2), it was held, that where a bill is filed by a creditor on behalf of himself and all others, every creditor has an inchoate interest in the suit from the moment the bill is filed ; and that, from that moment, time does not run against him. * * In the present case, the decree was made in 1821 ; therefore, not one-half of the twenty years within which the petitioner might make his claim had expired at that time. That being so, if *he has a right to establish his claim by relation to the time of filing the bill, *à fortiori* he has the same right by relation to the time of the decree.

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Mr. Simpinson and Mr. Duckworth, for the plaintiffs :

* * When *Sterndale v. Hankinson* was decided, there was no statute which in terms applied to courts of equity. Those Courts, therefore, thought that they might, when expedient, go out of the statute ; though in most cases they adopted it. Now, however, the statute is equally binding on courts of equity as courts of law ; and there is nothing which can prevent its operation but part payment or a written acknowledgment within the time.

Mr. West, for the heir-at-law.

Mr. Spurrier, in reply :

It cannot be imputed as *laches* to the petitioner, that he did not see the Master's advertisements. In *Angel v. Haddon* (3), the merits relied upon were, that the creditor was not aware of the decree. In recent cases, the funds have been called back after apportionment. With respect to the Statute of Limitations, no doubt it applies to equitable as well as legal proceedings ; but it does not alter the question of relation. The Court will not

(1) Stat. 3 & 4 Will. IV. c. 27, (2) 27 R. R. 210 (1 Sim. 393).
s. 40. [Rep. 37 & 38 Vict. c. 57, s. 9.] (3) 1 Madd. 529.

BERRINGTON *v.* EVANS. deviate from settled rules, merely because the limitation of time, instead of being fixed by analogy, is fixed by express enactment. The petitioner has still a right to insist that his claim was made when the suit commenced.

THE LORD CHIEF BARON :

[*438] It appears to me, that if *the argument for the petitioner be adopted, it will lead to this consequence, that at any period after the present, the claim of any creditor might be put in operation, so long as any portion of the estate remains undivided. That brings me, then, to this question—whether, for the purpose of forcing a construction to take a particular case out of the statute, by holding that a suit, though unknown by a man to have existed, shall be deemed his suit—whether, notwithstanding, too, the old principles of courts of equity relative to stale demands, a creditor, under these circumstances, shall be allowed to enforce his claim at any period of time, even, perhaps, when the cause is dismissed? The argument which has been urged is ingenious; but, if I were to allow it to go the length contended for, no Judge, under any circumstances, could resist a demand of this sort. It is urged that a bill filed by one creditor on behalf of himself and all others, is a bill filed by all, and, consequently, that if it be filed before the Statute of Limitations has attached to the debt of any creditor, it is good to keep that creditor's claim alive, and, therefore, that any creditor who never has heard of the suit, may come at the end of fifty years and insist upon being let in. That is the extent of the argument, and that is made to depend only on the case of *Sterndale v. Hankinson*. If I were forced by anything that appears in that case to carry it to the extent contended for, I should feel bound to yield to its authority. But upon looking at that case, I think that I should not be justified in pressing it to that length. There the intestate died in June, 1810, the bill was filed in 1812, and the decree was made in 1818, which was the first period when any other creditor than the plaintiff could take advantage of the suit. The decree being made, the creditor whose claim was disputed came before the Master, and in effect made this statement—"I was aware of the suit, but I considered the bill to be

filed on my behalf. It was filed with my knowledge and my consent, and, *therefore, I took no steps. I could not in this suit have made my claim at any other time, and if I am barred of my relief, the consequence will be, that every creditor will be barred unless he files his bill or brings his action and puts the estate to the expense of a number of suits." Now, as the Statute of Limitations was a bar to claims at law, but not to claims in equity, (courts of equity only acting in general by analogy to the proceedings at law), it often became the duty of the Judge in equity to consider whether the statute might be rendered applicable to equitable proceedings. The Judge in equity had a right to look to the facts of the case, to see whether the time limited by the statute having elapsed, the statute should be allowed to operate, or whether circumstances did not qualify its operation, so as to do away with the rule drawn from analogy. Now, in the case in question, the Judge considered that the facts qualified the rule.

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If I were obliged to consider the effect of that decision as establishing a general rule, under all circumstances, that the filing a bill by one creditor of A. on behalf of himself and all others, lets in the claims of all the other creditors, it is clear that the new statute would have no application to this case, because this would then be the suit of Kemp as well as Berrington, and the bill having been filed within the twenty years, Kemp's interest could not be affected by the new statute. But I own I cannot conceive that the case goes the length of deciding that time could, under no circumstances, be a bar in such a suit, either on the statute analogy, or any other. That being so, let us see how the case is affected by the new statute.

At law, even before the statute, the petitioner could not have enforced his judgment after twenty years. The new statute fixes the time for bringing an action on the judgment at law. The statute was also intended to put an end altogether to the discretion of courts of equity, in those cases where they had before acted by analogy to *the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the Court, but is incorporated in the statute. The words of the statute are, that after a certain day, no action,

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BERRINGTON ^{v.} EVANS. suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, at law or in equity, but within twenty years after the right shall have accrued. Now I am not prepared to say whether, if I could be satisfied that the bill was filed with Kemp's consent, and he meditated, like Berrington, to prosecute his claim under that bill—whether, under those circumstances, I should arrive at a different conclusion. Even then, I apprehend, he would have to give a satisfactory reason for remaining so long without calling in the aid of this Court, in his own person. But supposing that he never knew of the filing of the bill, or of the progress of the suit, and that twenty-five years after the right had accrued, upon a new discovery of the suit having been instituted and of funds being in Court, he petitions to be allowed to go before the Master and make his claim, can I say that his petition is not a proceeding in equity within the statute? The statute says that such a claim shall not be made after twenty years, unless in the mean time some part of the money, either principal or interest thereon, shall have been paid, or some acknowledgment shall have been given in writing. These are the only exceptions mentioned in the Act. Nothing is said of the case of a bill being filed by one creditor for the benefit of the rest; and I cannot engraft another exception on the Act of Parliament. Considering, therefore, that this is a proceeding in equity to recover money upon a judgment upon which twenty years have run, and that it comes within none of the exceptions of the statute, I am of opinion that the claim is barred.

Petition dismissed.

1835.
July 4.
Dec. 17.

PROSSER v. EDMONDS AND OTHERS (1).

(1 Y. & C. 481—500.)

[481]

An assignment of a bare right to file a bill in equity for a fraud committed on the assignor, is contrary to sound policy, and void: therefore, where A., who was entitled to certain property under his father's will, for a valuable consideration, assigned the whole of that property (except a reversionary interest in the funds) to B., his father's

(1) *Dickinson v. Burrell* (1866) L.R. *Churchill* (1888) 40 Ch. D. 481;
1 Eq. 337; 35 L. J. Ch. 371; *Guy v.* 56 L. J. Ch. 670.

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executor, and afterwards assigned the whole of his interest under his father's will (including, therefore, the reversionary interest) to C. : Held, that C. could not maintain a bill to set aside the first assignment, on the ground of fraud committed by B. against A., the latter refusing to join as plaintiff in the suit.

Courts of equity will give no encouragement to contracts which savour of maintenance or champerty, though such contracts may not be within the strict legal limits assigned to those offences.

To a bill filed for carrying the trusts of a creditor's deed into execution, the scheduled creditors, who have not executed the deed, need not be parties.

After a plea submitted to, and bill amended, a demurrer may lie to the whole amended bill.

THOMAS TODD, by his will, after bequeathing certain annuities to various persons, directed that upon the respective deaths of those persons, the funds, which should have been set apart to answer the annuities, should be disposed of by his trustees and executors thereafter named, in the same manner as the residue of his real and personal estate. The testator, then, after mentioning that he had in his lifetime advanced considerable sums of money to his two sons, and, therefore, intended to give his daughter a larger sum than he would otherwise have done—gave, devised, and bequeathed to the defendant, R. Edmonds, (the husband of his daughter), and Richard Hughes, their heirs &c., all his real and personal estate, not thereinbefore disposed of, upon trust, to sell the real estates, and to convert into money so much of the personal as should not consist of money, and divide the proceeds into three equal parts, one third part thereof, and also 10,000*l.* out of the two other third parts, to be paid to his daughter, Catherine Edmonds, for her absolute use and benefit; and the residue of those two third parts to be paid to the testator's two sons, William and Robert Todd, and their respective executors, administrators, and assigns. The testator then directed that his son William should have the right of pre-emption of his real estates at *Poplar, at a fair valuation. That Robert should have a similar right in regard to his estates at Benhill; and that it should be lawful for the trustees to allow any of his children the pre-emption of any other parts of his property which he or she might desire, at a fair valuation; but that the trustees should not be prevented from disposing of his property by reason of such pre-emption longer than twelve

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calendar months after the testator's decease. The testator then appointed Thomas Edmonds and Richard Hughes to be the executors of his will.

Upon the testator's death, the executors proceeded to execute the trusts of the testator's will, and to administer his estate; and they set apart 11,600*l.* Consolidated Bank Annuities, for the purpose of paying the annuities bequeathed by the will. In August, 1828, they delivered their final account as such trustees and executors, to William and Robert Todd, who thereupon signed the account, and gave releases to the executors.

In March, 1829, William Todd, by an indenture, assigned his reversionary one-third share in the sum of 11,600*l.* Consols, to the defendant Edmonds, subject to a power for the re-purchase of the same within ten years. In June of the same year, he by an indenture assigned to his brother Robert Todd his one-third share in the testator's residuary personal estate; and also his power of re-purchase reserved to him by the last-mentioned indenture. He made no actual conveyance to Robert Todd of his interest in the real estate; but it was alleged by the bill that this indenture of assignment was intended to have that effect.

By virtue of several indentures, dated in June, 1829, and April, 1830, and executed between Robert Todd and the defendant Edmonds, the whole of the interest in the testator's property which Robert Todd had purchased of his brother, and also his own one-third share in the testator's residuary estate, became vested in Edmonds, Robert *Todd retaining only his reversionary one-third share in the 11,600*l.* Consols.

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In March, 1833, Robert Todd having opened a banking account with Messrs. Williams, Deacon, & Co., executed to them a conditional assignment of his reversionary interest in the 11,600*l.* Consols, as a security for all monies advanced or to be advanced to him by that firm. As a further security to Messrs. Williams & Co., Robert Todd, in the following month, executed to them a similar assignment of all his interest in the property devised and bequeathed by the testator, whether present, expectant, reversionary, contingent, or otherwise, and to which he or any person

or persons in trust for him might be entitled in any manner howsoever, or might recover by virtue of any suit or action to be commenced or prosecuted against the executors or trustees of the said will.

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Again, in June, 1834, Robert Todd being indebted to Messrs. Gramolt in the sum of 300*l.*, as a security for that debt, executed to them a conditional assignment of all his interest under his father's will, and all his interest in William Todd's share, subject to the prior incumbrances.

In consequence of the two assignments made by Robert Todd, of his interest in his father's residuary estate, first to Edmonds, and secondly to Williams & Co., these several parties entered into an arrangement, the consequence of which was an indenture dated the 12th of May, 1834, and made between Williams & Co. of the first part, Robert Todd of the second part, and Edmonds and Hughes of the third part, by which Williams & Co., at the request of Robert Todd, released to Edmonds and Hughes all claims which they, Williams & Co., might have upon the testator's estate, except as to the reversionary interest of Robert Todd in the annuity fund.

Lastly, by indentures of lease, and assignment and release, dated respectively the 4th and 5th of September, 1834, and made between Robert Todd of the first part, *Herbert George Jones of the second part, and the plaintiffs of the third part, reciting that Robert Todd was indebted to Jones in the sum of 1,600*l.*, and to the plaintiff Howard in 500*l.*, and to the several persons named in the schedule to the assignment in the several sums annexed to their names; and reciting that an arrangement had been made at the instance and request of Robert Todd, by which the plaintiffs had become personally responsible for the payment of the said several sums, with interest: it was witnessed, that for these considerations, Robert Todd granted, released &c., to the plaintiffs and their heirs, certain real estates therein specified, (which were, in fact, comprised in the testator's will); and also assigned to the plaintiffs, their executors &c., all the stocks, funds, securities, and personal estate to which he was entitled, in possession, remainder, or expectancy, under his father's will, upon trust to sell the real estate, and to convert into money such part

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of the personal estate as was convertible, and out of the proceeds, upon trust, in the first place to pay certain costs and expenses mentioned in the said deed of assignment; and in the next place, to pay to the plaintiff Howard the said sum of 500*l.*, with interest, and then to retain to themselves, the plaintiffs, the several sums of money which they should have paid, or become responsible to pay, to the said Herbert George Jones, and the several other creditors of Robert Todd, whose names were specified in the schedule thereunder written, with interest as therein mentioned, and to pay the residue (if any) to Robert Todd.

In consequence of this indenture, the debts due from Robert Todd to Messrs. Williams & Co., and to Messrs. Gramolt, together with the securities on which they were invested, and all powers for the recovery of the same, were assigned to the plaintiffs, in consideration of payment by them of the debts due from Todd to those respective parties.

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The plaintiffs having brought their bill against the *executors and Robert Todd, (the latter having refused to join as plaintiff), to have the benefit of the foregoing securities, and to set aside the transactions between Robert Todd and the defendant Edmonds, on the ground of fraud; the defendants, the executors, pleaded in bar of the suit the release of May, 1834. This plea was submitted to, and the bill amended, by stating the release, and charging that it was obtained by fraud and duress.

The amended bill also charged that the account delivered by the executors to Robert Todd was erroneous and fraudulent, and that he signed it under the pressure of embarrassed circumstances; that the release which he executed, upon receiving that account, was obtained from him for fraudulent purposes; that it had been tendered to him ready prepared for his execution; and that no time had been allowed to him to consider its effects, or to take advice upon its propriety; that a fair sale had not been made of many parts of the testator's property, both real and personal, but that the defendant Edmonds had retained the same at prices far below their real value.

The bill contained an allegation that the plaintiffs had paid Messrs. Williams & Co., and Messrs. Gramolt, the amount of their respective debts, with interest; and that they had "paid

large sums of money in payment of the debt of 1,600*l.* due to the said Herbert George Jones, and the other debts specified in the indenture of September, 1834."

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The bill prayed that the plaintiffs might have the benefit of the indenture of September, 1834, and of the several securities given to Messrs. Williams & Co., and Messrs. Gramolt. That the alleged settled account and release might be declared fraudulent and void, as against the plaintiffs, as claiming under Robert Todd; and that the release might be delivered up to be cancelled. That notwithstanding any transactions between Robert Todd and the defendant Edmonds, an account might be taken *of the testator's real and personal estate, not specifically devised or bequeathed; that the estates remaining unsold, or alleged to have been unsold by Edmonds, might be forthwith sold under the direction of the Court; and that the proportion of the plaintiffs, in the clear residuary estate of the testator, might be ascertained and secured for their benefit &c.

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To this bill the defendants, the executors, demurred, on three grounds: first, for general want of equity; secondly, that the creditors of Robert Todd, who were scheduled to the indenture of the 4th September, 1834, were not made parties to the bill; thirdly, because William Todd was not made a party to the bill.

Mr. Simpinson and *Mr. Koe*, for the demurrer:

* * Then there are three grounds on which this demurrer will lie: first, this is a purchase by the plaintiffs of a lawsuit. It is the purchase of an interest which has been released, and which can only be made available by a suit in equity. It is not the purchase of a chose in action, or of a vested interest, but of a right to set aside settlements of accounts and releases. It is, therefore, maintenance in the strictest sense of the word. Such a transaction cannot be supported in equity, any more than at law: *Stevens v. Bagwell* (1).

(THE LORD CHIEF BARON: There was some portion of Robert Todd's interest which had not been assigned to Edmonds.)

That was merely the reversion in the Consols, after setting apart

(1) 10 R. R. 46 (15 Ves. 139).

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sufficient to secure *the annuities. No relief is sought as to that, because the annuities are still subsisting. Besides, the plaintiffs derive their whole title, under the deeds of September, 1834, which cannot give them a right to institute a suit to set aside these transactions. Robert Todd gives them no authority to do so. The suit is, to a certain extent, for his benefit; and yet he makes no complaint of fraud, and there is an express allegation that he refuses to join in the suit.

Secondly, the scheduled creditors are not parties to the suit. * * *

Thirdly, William Todd should have been made a party to this suit. He had a right of pre-emption of certain estates specified in the testator's will. Some of those estates have been sold, and the plaintiffs seek to set aside the sale. If the sale were set aside, the parties would be restored to their original situation, and William would have the benefit of that result as well as Robert. * * *

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Mr. S. Girdlestone and Mr. Bethell, for the bill :

* * The objection on the ground of maintenance will not prevail. There is a portion of the property unaffected by any assignment to Edmonds, which has become vested in the plaintiffs, through the Gramolts; namely, Robert Todd's reversionary interest in the 11,600*l.* Consols. That circumstance alone is sufficient to sustain the bill, which extends to all the property of Robert Todd. *Stevens v. Bagwell* (1) is distinguishable from the present case; for there *what was held to be maintenance arose out of an express agreement between the parties. * * *

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Secondly, even if the deed contained a specific trust for the creditors, they would not be necessary parties to a bill brought by the trustees, to carry those trusts into execution.

The objection that William Todd is a necessary party is quite untenable, because the bill alleges, and the demurrer admits, that all the right and interest of William is vested in Robert. * * *

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*Mr. Simpkinson, in reply. * * **

(1) 10 R. R. 46 (15 Ves. 139).

THE LORD CHIEF BARON :

The point which, in this case, presents the greatest difficulty, is that which relates to the interest which Robert Todd had in the annuity fund, and which he assigned to these plaintiffs. No complaint is made in the bill of the misapplication of that fund, but it is insisted that the plaintiffs have a right to have their interest recognised distinctly in the reversionary portion of that fund. I incline to think that that interest is sufficiently disclosed to make the demurrer to the whole bill bad.

With respect to the question as to the validity of an assignment of a right to file a bill in equity, I must distinguish between this sort of case and the assignment of a chose in action or equity of redemption. It may be said that the assignment of a mortgaged estate is nothing more than an assignment of a right to file a bill in equity. But the equity of redemption arises out of an interest, though only a partial interest. Courts of law and equity treat the mortgage as a mere security, and there is an interest left in the mortgagor, which he may assign. But, in a case where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such a claim would be a question deserving of great consideration. My present impression *is, that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud ; and I should say that some authority is necessary to shew that a man can assign to another a right to file a bill for a fraud committed upon himself. I own, however, that in the present case there is considerable difficulty arising from the reversionary interest which Robert Todd had to assign ; and the question is, whether the bill is so framed as to entitle the plaintiffs to any equity on that subject.

With respect to the other points which have been raised, I think that William Todd, having assigned his interest to his

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brother, is not a necessary party to this suit. As to Jones, who was a party to the deed of assignment, there is some doubt.

Upon the whole, if I were called upon to decide this case now, I should decide against the demurrer on the narrow ground that there was, at the time of the assignment to the plaintiffs, a subsisting interest in Robert Todd, which did not pass to Edmonds. But the case deserves further consideration.

Dec. 17.

THE LORD CHIEF BARON :

The testator, after bequeathing certain annuities to various persons, directed that his real and personal estate should be sold by his executors, Edmonds and Hughes, and divided into three parts. His daughter, the wife of Edmonds, was to have one part; and, from the remaining two parts, she was to take 10,000*l.*, and the residue was to be divided between his two sons, Robert and William Todd; and he states, as his reason for giving his daughter a larger portion, that he had made advances to his two sons in his lifetime. He then specifies certain real estates, of which he gives the *right of pre-emption to William Todd, and other estates, of which he gives the right of pre-emption to Robert Todd; and then he gives his daughter a right of pre-emption of any part of the residue; so that, with the exception of the two parts specifically appropriated to William and Robert Todd, if they chose to purchase them, his daughter had a right, if she chose, to purchase the whole.

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The testator soon afterwards died. The two executors proceeded to administer his personal estate, and made sale of the real estate; and Edmonds, in right of his wife, purchased part of the real estate: though what part in particular was purchased by him is not specified; nor does it appear by the bill that he was the purchaser of any part of that of which the sons had a right of pre-emption. There was then a settlement of accounts, and there is a particular account annexed to the bill, and referred to; and, upon an inspection of that account, and from the circumstances stated in the bill, it appears that Edmonds had made payments from time to time to Robert and William Todd. These matters were then adjusted, and the balance due to

the brothers was paid to them ; and, up to that time, they acknowledged that the accounts were fully settled. Afterwards, both brothers executed releases to Edmonds and Hughes, the executors.

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There are many conveyances and deeds set forth in the bill, but it is not necessary to particularize all of them, because those on which the question turns are few. The executors set apart a considerable sum of stock to answer the annuities bequeathed by the will, and the bill makes no complaint of that appropriation. They did no more than would be decreed to be done by this Court, or any court of equity having the disposal of the testator's estate. By the release of 1829, Robert Todd purchased all the interest of his brother, William Todd ; and, by other instruments, executed in 1830, his interest stood thus : that, with the exception of the reversionary interest *which Robert Todd had in those sums which had been invested in the Funds for payment of the annuities, he had, in consideration of a certain sum, and further sums which Edmonds had lent him, assigned to Edmonds the whole of his interest in his father's residuary estate, and also the whole interest of William Todd, which he had purchased. The whole of the accounts, therefore, had been settled, and the whole of the interest of Robert and William Todd vested in Edmonds in 1830. Matters remained so until the year 1833. By an instrument executed in that year, Robert Todd, having borrowed a sum of money of Messrs. Williams, the bankers, for securing to them the repayment of that sum, assigned to them the reversionary interest in the one-third part of the annuity fund, to which he had a right. By another deed, executed soon afterwards, it appears that, conceiving he had still an interest in other parts of the property, he assigned to Williams & Co. all his interest in his father's residuary personal estate, upon trust, that what money they should receive should be held for his benefit. The next deed of importance is executed in 1834, to which those bankers and Robert Todd were parties, and also the executors. By this deed Williams & Co., at the request of Robert Todd, released to Edmonds and Hughes that claim in the residuary interest which he had assigned to them ; so that it appears that, for the second and last time, in May, 1834, the

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whole interest of Robert and William Todd was vested in the defendant Edmonds.

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The bill states misconduct in the executors in administering the testator's estate. It charges imposition and misrepresentation as made to Todd, to induce him to sign the release, and settle that account. It makes a case, which might be a case for Robert Todd to file a bill to call on the executors to acquit themselves by answer of the representations of fraud and concealment practised upon him. But still he had nothing but a naked right to file a *bill in equity—no legal right—no equitable interest, except a reversionary interest in those sums of money, out of which the annuitants were paid. If he had a right to file a bill at all, it was a naked right not clothed with any possession.

Under these circumstances the plaintiffs come upon the stage. In September, 1834, a deed was executed by Robert Todd to the plaintiffs. (His Lordship then stated the deed.) The plaintiffs, under colour of this conveyance, have filed the present bill, in which they call on the executors to answer for their proceedings in the administration of the testator's estate—by which they seek of the Court to set aside the deeds of conveyance from Todd to Edmonds—to annul the purchase by Edmonds of any portion of the real property of the testator—and generally for an account; and they ground themselves on representations stated to have been falsely made to Robert Todd, to induce him to enter into these arrangements. All that is material to the question is raised by the bill, to which Robert Todd is made a defendant, who had no complaint to make, and who refused to be a plaintiff.

The defendants, Edmonds and Hughes, have demurred to the bill on three grounds. One ground of demurrer is, that the scheduled creditors of Robert Todd are not parties; and another is, that William Todd is not a party. I do not find any case from which it appears that the mere circumstance of a creditor being interested in the administration of an estate, makes it necessary that he should be a party to a bill like the present. The mere engagement by a person to pay the creditors, if he gets in the fund, will not make them parties to any contract for their payment; though, no doubt, where the creditors are parties to and interested in a contract of that nature, they must be

made parties to a bill for carrying that contract into effect. Therefore, the demurrer would be well if confined to the fact that Jones is not a party; for he *was a party to the deed, and entered into an engagement under seal with the plaintiffs, by which it is plain that they are bound. The other creditors are named in the schedule, but there was no contract by which they are parties.

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The omission to make William Todd a party is not a ground for allowing the demurrer. He parted with his whole interest to Robert Todd, and there is no imputation of fraud as between those two persons, and no suggestion that William Todd had any ulterior interest whatever. It is not the object of the bill to bring before the Court any question as to the money in the Funds; and, therefore, any interest which William Todd has in that is undisturbed. He has no interest in any question here. He is, therefore, not a necessary party.

The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this—whether or not parties who either become purchasers for a valuable consideration, or who take an assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. Now, in the course of the argument, it was urged that an equitable as well as a legal interest may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, though he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me, that in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. For instance, that a mortgagor who conveys his estate in fee to a mortgagee, has in himself an equitable right to compel a reconveyance, when the mortgage-money is paid, is true. But that is a right reserved *to himself by the original security; it is a right coupled with possession and receipt of rent; and he is protected so long as the interest is paid; and it does not follow that the assignee of the mortgage and the mortgagee may not

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adjust their rights without the intervention of a court of equity. In the present case, it is impossible that the assignee can obtain any benefit from his security, except through the medium of the Court. He purchases nothing but a hostile right to bring parties into a court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase.

So, where a person takes an assignment of a bond, he has the possession; and, though a court of equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a court of equity to enforce payment of it. So, other cases might be stated to shew, that where equity recognises the assignment of an equitable interest, it is such an interest as is recognised also by third persons, and not merely by the party insisting on them.

What is this but the purchase of a mere right to recover? It is a rule—not of our law alone, but of that of all countries (1), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which upon general principles, and by analogy to such acts, a court of equity will discourage the practice. *Mr. Girdlestone* was so obliging as to furnish me with a case, that of *Wood v. Downes* (2), in which it appears to me that *the principle laid down by Lord ELDON goes the full length of supporting the judgment of allowing this demurrer. That was a bill filed to set aside certain conveyances, which it was alleged were obtained by the defendant, in consequence of his situation of solicitor to the plaintiffs, the estate comprised in the conveyance not being in their possession at the time, but subject to litigation. Lord ELDON, in decreeing relief, adopted not only the ground that the party was the solicitor of the plaintiffs, but that the transaction was contrary to good

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(1). See Voet. Comm. ad Pandect. (2) 11 R. R. 160 (18 Ves. 120).
Lib. 41, tit. 1, sect. 38.

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policy. He said—"The objection, therefore, is not merely that which flows out of the relation of attorney and client, but upon the fact that this was the purchase of a title in litigation, with reference to the law of maintenance and champerty;" and he accordingly decreed the conveyance to be set aside, on the ground of litigated title.

Here the proceeding is the converse of that in *Wood v. Downes*. It is not to set aside the conveyance in question, but to establish it. The principle is the same in both cases; for if, under the present circumstances, Robert Todd had filed his bill against the plaintiffs, I should have declared it to be a void deed, and should have ordered it to be set aside. Upon the same facts, therefore, I ought to refuse to establish the deed in their favour.

But the case does not rest here. There is a short but useful statute, which it is proper to refer to, that of the 32 of Hen. VIII. c. 9, which is a legislative rule on the subject, and consistent with general policy and the principles of courts of law and equity. Under that statute, if the person who parts with his title has not been in actual possession of the land within a year before the sale, he, as well as the buyer, is liable to the penal consequences of the act. I do not say that that is precisely the case here, because the conveyance purports to contain an ulterior trust for the party assigning, and, therefore, an action *could not be brought against him on the statute. At the same time, it is to be observed, that, from many cases in Anderson and Coke, it appears that courts of common law are favourable to actions on the statute, considering them to be highly beneficial, and not without good cause to be restrained.

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It has been the opinion of some learned persons, that the old rule of law that a chose in action is not assignable, was founded on the principle of the law not permitting a sale of a right to litigate. That opinion is to be met with in Sir William Blackstone and the earlier reporters. Courts of equity, it is true, have relaxed that rule, but only in the cases which I have mentioned, where something more than a mere right to litigate has been assigned. Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there courts of equity will allow the assignee

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to stand in the right of assignor. This is not that case. Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity.

The case itself is a strong illustration of the doctrine, that to encourage such transactions as the present is contrary to good policy. I do not know who the plaintiffs are; possibly they are attornies. Suppose, then, that this party having an interest under this will, and having settled all his rights, assigns all his interest for a valuable consideration; if he be at liberty afterwards, by another assignment, to create a new trustee for himself, and can give the trustee a right to bring the matter into litigation, if that trustee is an attorney, and the court of equity entertains the suit, what is the result? That all the funds must be brought into Court; and, as he stands in the situation of trustee, all the expense of litigation must be paid out of the fund; *so that he receives an advantage out of the litigation itself. This is not the policy of the law, and yet if this assignment be good as regards the plaintiffs, so as to enable them to administer the fund over again, it is equally good if the trustee happens to be an attorney.

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Upon these principles it appears to me, that this is a case of a purchase of a litigated title. Many cases are to be found to the effect, that where the title actually is in litigation, an agreement to divide the subject of dispute is not available in equity. But the policy of the law is not confined to those cases only.

Demurrer allowed.

1835.
June 25.

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BROOKS v. MACDONNELL(1).

(1 Y. & C. 500—518.)

An insurance was effected on goods on board a ship consigned to Buenos Ayres. The ship, with the cargo, was captured by the Brazilian Government, and condemned for an attempted breach of blockade. Notice of the capture was given by the insured to the underwriters, and an offer was made by the insured to abandon. The underwriters declined the offer of abandonment; and, after some negotiation, it was

(1) Cp. *Burnand v. Rodocanachi* (1882) 7 App. Cas. 333, 51 L. J. Q. B. 548, 47 L. T. 277.


arranged, that on payment by the underwriters of 35*l.* per cent. on the sum insured, the policy should be delivered up to be cancelled. This per-centage was accordingly paid, and the policy cancelled. Some years afterwards, in pursuance of a convention between Great Britain and the Brazilian Government, the goods were ordered by the latter Government to be restored to the owners, and compensation made. A claim was made by the underwriters to the whole or a part of the sum awarded for compensation; but held, that the underwriters having declined the offer of abandonment, the payment of the 35*l.* per cent. was a compromise of their liability under the policy, and that they were not entitled to any portion of the sum awarded for compensation.

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In the year 1826, the plaintiff carried on the business of a merchant, in partnership with Henry Butterworth, of Manchester, under the firm of Butterworth and Brooks. Henry Butterworth died in May, 1830, and on his death all his interest in the partnership property and effects, including the subject of this suit, became vested in the plaintiff.

In April, 1826, the plaintiff and Henry Butterworth, as such partners, shipped thirty-six bales of printed cottons *on board a ship called the *Atlantic*, bound from Liverpool to Buenos Ayres, the invoice value of which goods was 1,915*l.* 10*s.*

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On the 13th of May, 1826, the plaintiff and his late partner effected an insurance with the defendant John MacDonnell, as the agent for and on behalf of the Patriotic Assurance Company of Ireland, on the thirty-six bales of cotton; and John MacDonnell, as such agent, signed a policy of insurance, dated the 13th of May, 1826, by which the goods, therein described as thirty-six bales of printed cotton, marked , were insured by the Company from Liverpool to Buenos Ayres for 1,440*l.*, each bale being for that purpose valued at 40*l.*, to pay average on each package separately; and a premium of 3*l.* per cent. on the sum insured was paid to MacDonnell as the agent of the Company.

On the 1st of May, 1826, the *Atlantic* sailed from Liverpool on her voyage to Buenos Ayres, and in the course of such voyage, and for an alleged attempted breach of a blockade which the Brazilian Government had declared against the port of Buenos Ayres, was captured by the forces of the Brazilian Government, and taken into the port of Rio de Janeiro, where the ship, and all the cargo on board, including the thirty-six bales of cotton

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belonging to the plaintiff and his partner, were condemned. Many other ships of this country, and their cargoes, were about the same time seized and condemned in like manner.

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Shortly after the intelligence of the capture of the *Atlantic* and her cargo was received in England, the plaintiff and his partner applied to MacDonnell, as the agent of the Patriotic Assurance Company, for payment of the 1,440*l.* as for a total loss, and at the same time offered to abandon their interest in the goods. In answer to such application, the defendant, MacDonnell, wrote to the agents of the plaintiff and his partner a letter *dated the 13th of October, 1826, to the following effect: "GENTLEMEN,—I am favoured with yours of the 12th instant, announcing your wish to abandon your interest in the *Atlantic*, Scott, from Liverpool to Buenos Ayres. In reply, I beg to acquaint you, that, on behalf of the Company, I decline to accept of this abandonment. JOHN MACDONNELL, the Company's agent in London." After some negotiation, and in July, 1828, the defendant MacDonnell, on behalf of the Company, agreed to allow 35*l.* per cent. on the 1,440*l.* for all contingencies, on condition that the policy should be cancelled, and MacDonnell accordingly paid the plaintiff and his partner 504*l.*, being the amount of such per-centage; and thereupon the plaintiff and his partner delivered up the policy to MacDonnell, and a memorandum was at the same time indorsed thereon by MacDonnell, in the following words, viz.: "Settled, a loss by compromise, at 35*l.* per cent., being in full for all claims hereon, and cancelled this policy. 504*l.*, London, 21st July, 1828." The plaintiff and his partner, subsequently, together with other persons, caused representations to be made to the Brazilian Government of the losses they had sustained by the aforesaid captures; and in the commencement of the year 1829, the Brazilian Government undertook to liquidate the claims of his Britannic Majesty's subjects in respect of such losses; and [commissioners were appointed for that purpose].

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The plaintiff and his partner forwarded their claims, which were duly made, to the commissioners at Rio de Janeiro, who, on the 17th day of May, 1833, awarded them the release of their goods detained as aforesaid, and also a sum of 1,488*l.* 8*s.* 4*d.* for

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compensation for the aforesaid losses. During the time the plaintiff and his partner were substantiating their claims before the commissioners, the Patriotic Assurance Company sent out a claim to the Brazilian Government for a proportion of the indemnity claimed by the plaintiff and his partner; but neither the Brazilian Government nor the commissioners decided as between the plaintiff and his partner on the one hand, and the insurance company on the other, but left the question as between them to be determined in this country; and thereupon it was agreed between the plaintiff and his partner on the one side, and the Company on the other, that the sum of 1,488*l.* 8*s.* 4*d.* for the loss should be transmitted by the commissioners to the defendants, Messrs. Percival & Co., the bankers, to be received and retained by them for the benefit of the persons entitled thereto; and the same was accordingly, in or about the month of January, 1834, transmitted to them, with a direction to hold the money in the joint names of Mr. Charles Moss, as agent for Messrs. Butterworth and Brooks, of Manchester, and Mr. MacDonnell, as representing the Patriotic Insurance Company, until the parties agreed as to the appropriation of it.

The bill was filed by William Brooks, as the surviving partner of Henry Butterworth, against MacDonnell as the agent of the Patriotic Insurance Company; William Robinson, the secretary of the Company; and against *Messrs. Percival & Co., the bankers, to whom the compensation had been remitted by the Brazilian commissioners, on account of the parties entitled.

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The bill, after stating the facts, charged that MacDonnell and Robinson, as the agent and secretary of the Patriotic Assurance Company, respectively claimed some interest in the money awarded, and insisted that they were entitled to have either the whole or a part thereof paid to them. The bill prayed a declaration to whom the 1,488*l.* 8*s.* 4*d.* belonged, and that the defendants, the bankers, might be decreed to pay it to the plaintiff, and be restrained from paying it to the defendant MacDonnell, or any other person.

The answers did not dispute the accuracy of the general statements contained in the bill. The defendant MacDonnell, however, submitted that he was the mere agent of the Company

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in this country, and had no interest in the matter in question, except as such agent, and that he ought not to have been made a party to the suit. The defendant Robinson, as the secretary to the Company, submitted, on behalf of the Company, that, if not entitled to the whole of the 1,488*l.* 8*s.* 4*d.*, the Company was at least entitled to be repaid the 504*l.*, the amount of the 35*l.* per cent., paid by the Company according to the arrangement with the plaintiff and his partner.

The money was paid into Court by the defendants, the bankers, pursuant to an order for that purpose, and was invested in Bank Annuities.

The cause now came on for hearing on admissions.

Mr. Simpkinson and Mr. Stinton, for the plaintiff :

[509] The clear effect of the arrangement of 21st July, 1828, was this : the assured agreed to accept 35*l.* per cent. in lieu of all claims, and agreed to release the Company. The Company were released from all liability in respect of the goods, on payment of this money. They could have no *interest in the goods ; and, on the other hand, the plaintiff and his partner could have no further claim on the Company.

[510] It is quite immaterial whether the plaintiff had a right to abandon or not, because the offer to abandon was rejected by the Company. The dealing between the parties was totally different to the case of an abandonment. * * The present case is governed in principle by *Blaauwpot v. Da Costa* (1), in which satisfaction having been made under a commission for distribution of prizes to the insured, such of the insurers as had paid were held entitled to restitution, but not those who had compounded and renounced salvage. The arrangement in this case amounted to a compounding of the liability of the Patriotic Assurance Company, and to a renunciation of any right to salvage. * * *

Mr. Maule and Mr. Griffith Richards, for the defendants
MacDonnell and Robinson :

The total proceeds are 2,552*l.*, on an advance admitted originally to be of the value of 1,440*l.*

(THE LORD CHIEF BARON: The question of value cannot influence my decision.)

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It will appear by the *policy that it was a valued policy. There is no statement as to the price actually paid; nothing more than that the price is the invoice price.

(THE LORD CHIEF BARON: Suppose in this case the claim had failed, and the commissioners had not awarded anything, and the goods had been lost, would your client have been liable to pay any thing more?)

We are in the situation of persons who have paid as for a total loss.

(THE LORD CHIEF BARON: In cases of total loss, the insurers are entitled to the salvage, paying the charges and expenses, but not in the case of partial losses.)

* * The arrangement amounted to nothing more than an agreement to put an end to the policy. When a total loss occurs, and is satisfied by payment, the policy is always delivered up to be cancelled; but that does not interfere with the right of the underwriter to say to the insured, you are a trustee for me of the surplus received *aliunde*. * * The plaintiff, in the present case, having received 35*l.* per cent., ought to be treated as a trustee for the underwriters, if not of the whole sum awarded, at least to the extent of the 35*l.* per cent. * * If there be nothing in the documents, which there is not, to deprive the underwriters of salvage, and to give it to the assured, then, according to the rules of law, the underwriters are entitled to it. * * *

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Mr. Koe, for the defendants, the bankers.

THE LORD CHIEF BARON (without hearing the reply):

Upon full consideration, I entertain no doubt whatever about the case. I certainly did entertain some doubt at one time, but that doubt was entirely removed in the course of the argument; and I will not, therefore, take any time to consider of this case, but will dispose of it at once. I do not, in any manner, dispute any of the general principles laid down in the course of the

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argument on the part of the defendants in this case. A policy of assurance is clearly only an instrument of indemnity. As a general rule, it cannot be carried further. It is a rule, also, that in all cases of total *loss, salvage belongs to the underwriter, and he pays all the expenses. It is also clear, that whenever the underwriter adjusts a partial loss, he still remains liable on the policy, and may go on paying partial losses exceeding in the whole cent. per cent., and may ultimately have to pay a total loss of cent. per cent. Such a case is possible. The question is, what is the meaning of the contract in this case? To enable me to resolve this, I must endeavour to judge what was the intention of the parties. Looking at the facts stated on both sides, I can feel no doubt that the assured were entitled to some compensation. No doubt is suggested as to their right to bring an action immediately after the loss was ascertained; but whether they should at that time bring an action or wait the possible restoration of the goods seems to have been matter of doubt. It has been contended on the one side, that I should treat this as a case of a total loss, and that the 35l. per cent. paid by the underwriters must be considered as a payment by them in respect of a composition, that is, as if they had paid 100l. per cent. The necessary consequence of this would be, that the underwriters would be entitled to the whole of the money, deducting the expenses of recovering it. The first question is, can I bring the case to that? I think I cannot: because I find that when an abandonment was proposed by the insured, the underwriters rejected it. It is quite clear that they then considered that they might affect their interest, if they accepted the abandonment. They must have had some reason for refusing it; and it is not disputed that they did reject it. I cannot now treat it as if one party had insisted on a total loss, and the other had denied it, and had contended that it was a partial loss only. In such a state of circumstances the parties would probably meet, and the underwriters would say—taking this as a partial loss, we are willing to pay all expenses, and to furnish you with the means of recovering the goods; or if you will relinquish all claim on us, we will pay you 35l. per cent.

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*One reason why this cannot, as it appears to me, be treated as

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a case of total loss is, that there is no apparent reason why they should not have been entitled to receive 100l. per cent., and there is no evidence for what reason they consented to take less. In the absence of any distinct evidence upon the subject, I think I cannot consider it as a case of total loss. The next question is, how are we to treat it as a case of partial loss? In ordinary cases, the underwriter and broker estimate partial loss at so much per cent., which is paid, and the policy remains as before, and is not in any manner cancelled. I have been a good deal struck by the argument that the policy being only a contract of indemnity, if a partial loss be incurred, and is paid for, and the insured gets indemnified *aliunde*, the underwriter is entitled to restitution; and it occurred to me, whether it was not probable, in the present case, that the underwriters had calculated the expense which might be incurred in an attempt to recover the goods, and had paid the 35l. per cent. in respect of that expense. The result of that would be, that whatever might be the expense incurred, would be answered by the 35l. per cent.; but if not incurred, would have come back in reduction of the 100l. per cent. Another result would have been, that if the insured had recovered the goods, and the 35l. per cent. besides for expenses, the underwriters would have said, as you have recovered the goods and the expenses, pay us back our 35l. per cent. And in this case, if this had been a mere naked settlement of a partial loss, I should have thought the expenses had been incurred for the benefit of the underwriters. But I cannot treat this as a mere naked partial loss, in which, without going into particulars, a given sum is taken for a partial loss; for it would not be consistent with the terms of the policy, because the underwriter adjusts a partial loss, on the ground that he continues liable to other partial losses, and also to the entire loss. In the present case, it is clear, that the loss must have been treated *as a partial loss; and that the underwriters, by paying the 35l. per cent., purchased an exoneration from all further liability in respect of loss. It cannot be doubted, that if the goods had been restored shortly after the arrangement took place, and the ship containing them had been afterwards lost, the assured could not have recovered on the policy. It is

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quite clear that neither party contemplated the settling of a total loss. I must consider that they intended to effect an arrangement by which the underwriters, representing to the assured that there was fair ground for expecting that their goods would ultimately be returned, though some loss might be incurred by the delay in the sale, said, take 35*l.* per cent. from us, and absolve us from all further claims; and we, on the other hand, will in like manner release you from all further demands. I so interpret the contract; and it appears to me that no other reasonable construction can be put upon it consistently with the conduct of the parties. How can I possibly assume that the assured would be so absurd as to give up 100*l.* per cent. for 35*l.* per cent., when the full demand was not in any jeopardy? Or that the underwriters would be absolved from a loss total or partial, without paying some consideration for it? I consider that the underwriters in effect said, we consider this as a partial, and not a total loss. If you will also treat it as such, and will discharge us from all future liability, by putting an end to the policy, we will give you a liberal compensation.

It has been said that the cancelling of the policy does not defeat the right of the underwriters to salvage. This, however, means nothing more than that when a total loss is adjusted, and the policy is delivered up, the underwriters are entitled to salvage, paying the expenses. But the contract is put an end to, by the payment by the underwriters of the cent. per cent. But it is entirely different in the case of a partial loss. If I could consider this as a case of a total loss, then the underwriters would be *entitled to the whole of the money. I cannot, however, consider it as a total loss, for the reasons I have already stated.

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Considering this, therefore, as I am obliged to do, as a contract by which the assured gives up all claim on the underwriters for 35*l.* per cent., and which the underwriters accordingly pay, I am of opinion that the underwriters cannot establish a claim to any part of the fund in Court. I am inclined to think that the underwriters in this case are more excusable than they are supposed to be in some other cases in the courts of law. I think that, under the circumstances of this case, there should not be any costs on either side.

WILMOT AND OTHERS v. THE CORPORATION OF COVENTRY (1).

(1 Y. & C. 518—525.)

1835.
July 13.
Dec. 3.

[518]

A court of equity will not compel a corporation to execute a legal assurance of corporate property in pursuance of a contract not under seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the contracting party, on the faith of the expressed legal assurance.

BEFORE the passing of the late Act for the regulating municipal corporations (2), the affairs of the corporation of Coventry were conducted by certain members of their body called the council, who held monthly meetings at the Guildhall. At these meetings, orders, called orders in council, were made, relative to the matters discussed before them; and entries of such orders were made in the books of the corporation; which entries, when they concerned the disposal of property, were in fact the instructions from which legal assurances were prepared by the town clerk.

In the year 1802, Mr. Inge being then the town clerk, the following entry was made in the minute book: "3rd August, 1802. Before John Mullis, Esqr., Mayor, &c., (Here followed the names of several aldermen, and amongst them Alderman Williamson.) Whereas Alderman Williamson did, on the first day of January now last past, *advance and lend to this corporation at interest, after the rate of 5*l.* per cent. the sum of 500*l.*, and for which no security hath yet been given to him: It is therefore now ordered and agreed, that Alderman Williamson shall have a mortgage security for the same 500*l.*, upon Keresley tithes. And it is further ordered, that Inge and Carter do forthwith prepare such mortgage."

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From entries made in the books of the treasurer of the corporation, it appeared, that interest upon the sum of 500*l.* had been paid by the corporation to Alderman Williamson, from 1802 till 1815; the last entry being made in January, 1816, for the interest due the preceding Michaelmas.

In 1816, Alderman Williamson died, having by his will

(1) Cp. *Mayor of Kidderminster v. Crow*, '93, 3 Ch. 535.
Hardwick (1873) L. R. 9 Ex. 13, 43 (2) 5 & 6 Will. IV. c. 76. [Rep.
 L. J. Ex. 9; *Mayor of Oxford v.* 45 & 46 Vict. c. 50, s. 5.]

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appointed the plaintiffs his executors; who now brought their bill, insisting that the entry so made in the minute book was, in fact, an agreement by the corporation to mortgage the tithes of Keresley, in consideration of the sum of 500*l.* lent to them by the testator; alleging also, that a large sum for principal and interest remained due to them on that security: and praying for an account and payment thereof, or that the corporation might be advised to convey and assure to them the tithes of Keresley, absolutely freed and discharged of all right of redemption therein, and might deliver up to them all deeds, &c., relating thereto.

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The defendants, by their answer, stated, that they did not believe, that Alderman Williamson had ever lent 500*l.*, or any other sum, to the corporation for their own use; but they believed, that, being a very influential man, he in the year 1802 advanced 500*l.* for election purposes, which advance he prevailed upon the corporation to enter into their books. That Williamson was from October, 1801, to February, 1803, one of the auditors of accounts of the receiver and treasurer of the corporation; and yet such advance did not appear to have been entered in any *of the accounts. That though interest appeared to have been paid upon that sum, yet the first payment was in May, 1803, and then only for eight months previous to the 25th of March, in that year. That no interest appeared to have been paid after January, 1816, though Williamson did not die till the October following.

Mr. Temple, and *Mr. Elmsley*, for the plaintiffs:

Though at law a corporation is not bound except by seal, that is not so in equity: *Marshall v. Corporation of Queenborough* (1).

(ALDERSON, B.: There the VICE-CHANCELLOR said he was inclined to think, that a corporation might be compelled to make a legal grant of their property in pursuance of a regular corporate resolution, if upon the faith of that resolution expenditure had been incurred. Here no expenditure has been incurred in pursuance of the resolution.)

There are many other things besides expenditure, which if done or suffered by Williamson in pursuance of the agreement would

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be sufficient to raise a consideration ; as, for instance, a right com-
promised. Here there was an agreement for a future mortgage ;
and Williamson, in consideration of that agreement, forbore to sue
the parties, though in fact they were personally liable. Besides, the
resolution amounts to a distinct admission by one party, that the
other had done every thing he had to do, and that the admitting
party would carry into execution all that was legally required to
be done, to complete the contract. Though no further sum was
advanced after the agreement, interest was regularly paid.

Mr. Simpkinson and Mr. Koe, for the defendants :

* * This is a mere *nudum pactum*, to grant a security to
a person, who has advanced his money without any security
at all. How then is this corporation benefited, or how bound by
an entry such as this, which has been made without any con-
sideration ? Besides, it is admitted, that, at law, a corporation
will not be bound by any agreement not under seal relating to
the corporate property. The general rule in equity is the same :
Taylor v. Dulwich College (1), *Winne v. Bampton* (2). The case
which has been cited, notwithstanding the *obiter dictum* of the
VICE-CHANCELLOR, is not different from the others in principle.

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Mr. Temple, in reply :

* * A man would not lend the money without a stipulation
for its repayment ; and if a corporation are not bound by a loan
of money, *qua* loan, the inference is, that, at the time of the
original advance, there was an *agreement to grant a mortgage.
That being so, the entry completes the agreement ; for, after
reciting the loan by Alderman Williamson of the 500*l.*, and that
“ no security hath yet been given to him,” it directs that “ he
shall have a mortgage security for the same.”

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[*523]

ALDERSON, B. : [after referring to the *dictum* of Sir JOHN LEACH
in *Marshall v. The Corporation of Queenborough* (3), and
observing that it was not at all necessary to question the
accuracy of that *dictum*, said :]

Dec. 3.

In the case of *Taylor v. Dulwich College*, the LORD CHANCELLOR

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(1) 1 P. Wms. 636.

(3) See last preceding page.

(2) 3 Atk. 475.

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expressly decided, that a corporation could not bind itself by contract as to its revenues unless under seal; and this is confirmed by *Winne v. Bampton* (1). Unless, therefore, an equity can be raised *in this case, out of some subsequent acts done or omitted by Williamson, on the faith of this expected mortgage, I do not see how I can decide in favour of the plaintiffs. Now, here it appears, from the memorandum dated August, 1802, that the money had before then been lent to the corporation at interest; and I can see nothing which Williamson does, or undertakes to do, as the consideration for this subsequent agreement on the part of the corporation. He does not undertake to give time for the payment, or to forbear suing them. His situation as to his claim on the corporation was in no degree changed by the agreement. Nor do I see any fair inference to be drawn from the word yet, as importing an original agreement for a security, when the money was first advanced.

It therefore appears to me, that, according to the authorities, this is not a contract binding the corporation, not being under the corporation seal; and that the other circumstances are not sufficient to raise an equity, such as would have been raised in *Marshall v. The Corporation of Queenborough*, in case the facts suggested in that report had been made out to the satisfaction of the VICE-CHANCELLOR.

Upon the whole, I think that the bill must be dismissed with costs.

Decree accordingly.

1835.
Dec. 18, 19.
1836.
Feb. 24.
[589]

LEES v. MOSLEY AND ANOTHER (2).

BEFORE THE LORD CHIEF BARON, PARKE, B., ALDERSON, B.,
AND GURNEY, B.

(1 Y. & C. 589—611; S. C. 5 L. J. (N. S.) Ex. Eq. 78.)

Testator devised certain real estate as to one moiety or equal half part thereof to his son H. J. for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as H. J. should by deed or will appoint; but in case H. J. should not marry and have issue who should attain the age of twenty-one years, then to his (the testator's) son O. in fee: Held, that H. J. took

(1) 3 Atk. 473.

Q. B. D. 575; affd. 9 Q. B. Div. 643,

(2) *Morgan v. Thomas* (1882) 8 51 L. J. Q. B. 556, 47 L. T. 281.

an estate for life in the moiety, with remainder to his children as tenants in common in fee.

The word "issue" in a will will yield to the intention of the testator to be collected from the words of the will; and therefore requires a less demonstrative context to shew the testator's intention than the technical expression "heirs of the body."

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ROBERT FEILDEN, by his will, after bequeathing the bulk of his personal property to his wife, and after devising various real estates in the counties of Lancaster and Chester to his eldest son Robert Mosley Feilden in fee, devised as follows: "I give and devise all that my freehold lease of a farm in Prestbury, in the county of Chester, called Barber's tenement, and all and every my chief rents in the town of Manchester, and also my two warehouses in Poolfold, in the said town (subject to a mortgage for 4,000*l.* secured thereon), unto my two sons, Henry James and Oswald Feilden, in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned, that is to say, as to one moiety or equal half part thereof, to my son Henry James for life, with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he the said Henry James shall by deed or will appoint; but in case my said son Henry James shall not marry and have issue, who shall attain the age of twenty-one years, then I give and devise the said moiety to my son Oswald, and his heirs for ever." And as to the other moiety of the said farm, chief rents and warehouses, the testator gave and devised the same to his son Oswald and his heirs absolutely for ever.

At the date of the will and of the death of the testator, *Henry James Feilden was a bachelor. Upon the death of the testator, he entered upon and suffered a recovery of his moiety of the property so devised to himself and Oswald, and the whole was afterwards conveyed to the defendants as trustees for sale.

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The property having been put up for sale by auction in lots, the plaintiff attended at the sale, and was declared the purchaser of Lot 1, which comprised the warehouse at Manchester. He accordingly paid his deposit, and entered into a written

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agreement with the vendors to complete the purchase, upon having a good title made to him. He afterwards, however, upon learning the state of the title under the foregoing will, refused to complete his purchase, contending that Henry James Feilden having only a life estate in the property devised to him, the recovery suffered by him was inoperative to convey his moiety of the estate to the defendants. The defendants, on the other hand, insisting on their title to sell, the present bill was filed, praying for the delivery up of the agreement, and the return of the deposit; and the question at the hearing was, whether Henry James Feilden took an estate for life, or an estate tail under the will. The case originally came on and was partly heard before Alderson, B., at Gray's Inn Hall, when his Lordship reserved it for further argument before the full Court, on account of the general importance of the question.

Mr. Preston, Mr. Duckworth, and Mr. Lynch, for the plaintiff:

[591] * * It may be conceded, that where there is a gift to one for life, and after his decease to his issue or issue male as tenants in common and their heirs, it has, under circumstances, been held to be an estate tail: *King v. Burchell* (1). But in that and similar cases, there was a limitation over, on an indefinite failure of issue of the parent. * * There is a limitation over in this case. The terms of that limitation, however, instead of supporting the construction of an estate tail, defeat it. The ulterior gift is not to take effect upon a failure of issue generally, but in an event totally distinct from it, and which might have excluded the issue, namely, "in case my said son shall not marry and have issue who shall attain the age of twenty-one years." In *Doe d. Dary v. Barnsall* (2), there was a limitation of the same nature. [They also cited *Right d. Shortridge v. Creber* (3), *Doe d. Cooper v. Collis* (4), *Hockley v. Mawbey* (5), and other cases upon this point. The word "issue"

(1) Ambl. 379; 1 Eden, 424.

8 Dowl. & Ry. 718).

(2) 3 R. R. 113 (6 T. R. 30; 1 Bos. & P. 215).

(4) 2 R. R. 388 (4 T. R. 294).

(5) 1 R. R. 93 (1 Ves. Jr. 143).

(3) 29 R. R. 444 (5 B. & C. 866;

is more flexible than the expression "heirs of the body." *Curshaw v. Newland* (1), *Doe v. Collis* (2).]

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The next observation to be made is, that here the limitation to the issue is by way of remainder. That distinguishes this case from *Wilde's* case (3). * * The superadded words of limitation are also of great importance. [*Doe v. Collis* (2).] In *Doe d. Gilman v. Elvey* (4), the words, "equally to be divided," annexed to the superadded words of limitation, were held to prevent H. Gilman from taking an estate tail; and the word "respective" will have the same effect here. * * In *Mogg v. Mogg* (5), which was very like the present case, and in *Franklin v. Lay* (6), the *effect of the superadded words of limitation was destroyed by the limitation over upon an indefinite failure of issue. * * *

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Mr. Temple, Mr. Hodgkin, and Mr. Bagshawe, for the defendants:

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Henry James Feilden took an estate tail. * * In *Doe v. Gallini* (7), DENMAN, Ch. J., in delivering the judgment of the Court, says, that the word issue embraces the whole line of descendants generally, and is synonymous with "heirs of the body." * * The rule is, that technical words in a devise shall have their legal effect, unless there are other words which clearly deprive them of their ordinary signification. [*Jesson v. Wright* (8).]

(THE LORD CHIEF BARON: The words "heirs," and "heirs male," in those cases, must be words of limitation, because heirs are not co-existent. That does not necessarily apply to the word "issue," which may mean existing issue, or all the descendants.

ALDERSON, B.: When the words "heirs of the body" are used in their proper sense, it is certain that heirs in *succession are meant. Therefore, a devise to heirs of the body, "share and

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(1) 2 Bing. N. C. 58.

(6) 23 R. R. 215 (2 Bligh, 59, n.).

(2) 2 R. R. 388 (4 T. R. 294).

(7) 2 Nev. & M. 633; 5 B. & Ad.

(3) 6 Rep. 17 b.

642.

(4) 7 R. R. 579 (4 East, 313).

(8) 21 R. R. 1 (2 Bligh, 57).

(5) 15 R. R. 185 (1 Mer. 654).

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share alike," is an inconsistency; but a devise to the issue, "share and share alike," is not necessarily so.)

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* * Is there any thing in this will to control the meaning of the word "issue," and to take it out of its ordinary sense as a word of limitation? It is clear that the testator never contemplated that Oswald could take any interest in Henry James's part of the estate, until all the descendants under Henry James were extinct. The plaintiff's construction leaves one of those descendants totally unprovided for. * * This is a gift to a father in tail, with a power of appointment enabling him to cut down his own interest to that of an estate for life. * * *

(THE LORD CHIEF BARON: Where an estate tail is given in clear words, an additional power, inconsistent with that estate, is void.)

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* * The question is, what is the intent as to the gift over? Does it mean on failure of issue of particular persons designated in the will, or after an indefinite failure of issue? No doubt there are many cases where general technical words have been held to be words of purchase. But in those, the limitation over did not depend on an indefinite failure of issue. Here, on the contrary, it does so depend; for the words as to the issue attaining twenty-one, do not negative the construction that an indefinite failure of issue was intended. [*Jack d. Featherstone v. Featherstone* (1), *Doe v. Smith* (2).] So, if *Doe v. Goff* (3) had been capable of being sustained on the ground of the *limitation over, Lord REDESDALE would not have denied it to be law (4).

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(THE LORD CHIEF BARON: If he was of opinion that an estate tail vested in the ancestor by the original limitation, the limitation over might be rejected. In that case he might be right in saying that *Doe v. Goff* was not law, but not if the original limitation offered any reasonable doubt.)

There is, however, no occasion to resort to the gift over to support this case; and the superadded words of limitation, whether

(1) 39 R. R. 1 (3 Cl. & F. 67).

(3) 11 East, 668.

(2) 4 R. R. 521 (7 T. R. 431).

(4) 21 R. R. 41.

engrafted on the words "issue," or "heirs of the body," are inoperative to control the estate tail: *Denn v. Puckey* (1), *Mogg v. Mogg* (2), *Franklin v. Lay* (3). * * *

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Mr. Preston, in reply :

* * The mere circumstance of the testator's forgetting that by the limitation over in case of the issue dying under twenty-one, some of his descendants might on a certain event be defeated, is not a sufficient reason for construing this an estate tail. If *Jesson v. Wright* be correctly reported, Lord REDESDALE did not see the true bearings of *Doe v. Goff*, and throughout the argument in the former case the authority of the latter is not disputed.

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* * There is no case where the word "issue," with super-added words, has not been held to be a word of purchase, unless there be a clear intention to the contrary. In *Jack d. Featherstone v. Featherstone*, there were no superadded words of limitation.

[Many other cases were cited on either side, to which further reference here is unnecessary.]

ALDERSON, B., now delivered the judgment of the COURT. After reading the clause of the will above stated, his Lordship proceeded as follows :

1836.
Feb. 24.

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The question is, whether under this devise Henry James Feilden took an estate for life or an estate tail.

It has been long settled, that in construing devises the governing principle is, the intention of the testator to be collected from the words of the will itself. In order to ascertain that intention, however, the Courts have adopted rules which no doubt it is very desirable should be as clearly and distinctly laid down as possible, and generally acted upon. And with this view it is often far better that the particular objects of individual testators should occasionally be frustrated rather than that there should be a general uncertainty in the titles to real estates, productive, as such uncertainty always must be, of expense, and presenting, as it must in many cases do, obstacles to the easy transmission of landed property from one purchaser to another.

(1) 2 R. R. 601 (5 T. R. 299).

(3) 23 R. R. 215 (6 Mad. 258).

(2) 15 R. R. 185 (1 Mer. 654).

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But in endeavouring to attain this laudable object, the Court must take great care, and exercise much watchfulness, lest from a mere love of generalisation they shake titles already existing, with a view to future and theoretical good. Upon a careful examination of the authorities, we think that it may be safely laid down as a rule, that in a devise technical words, or words of definite meaning, shall always be construed according to their legal or definite effect, unless, from other inconsistent words in the will, it be quite clear that they are used in some other definite sense. Thus, if the words "heirs of the body," which are technical words, properly admitting only of one meaning, are used, it becomes necessary to shew affirmatively that the testator meant clearly to use them as words of purchase; or, more correctly, as words descriptive, not of all the descendants of the body, but of one definite class only of such descendants. It is not *enough to raise a reasonable doubt whether he intended to use them as words of limitation, or to shew a probable conjecture that he intended to designate children only by that phrase.

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Thus, in the case of *Jesson v. Wright* (1), the House of Lords, overruling the previous decision of the King's Bench, held that W. W. took an estate tail. There the devise was to W. W. for life, remainder to the heirs of the body in such shares as W. W. should appoint; and for want of such appointment, to the heirs of the body, share and share alike, as tenants in common; and if but one child, the whole to such one child; and for want of such issue, then over. Now there the only circumstances to control the words "heirs of the body" were the provision that they should take as tenants in common, and the use of the word "child." But these circumstances might, not unreasonably, apply to the mode in which the testator intended the heirs of the body to take, (a mode which the law would not allow,) and by no means clearly shewed that he meant to limit those words to the children of W. W. only, excluding their descendants, and to devise over the estate before there should be a total failure of the descendants of W. W.—a conclusion to which all the various inconveniences so forcibly pointed out in that argument would lead.

(1) 21 R. R. 1 (2 Bligh, 1).

Another instance of the application of the rule with which we began, may be found in that class of cases in which “sons” or “children,” which in their proper sense are words of purchase, have been held to be words of limitation. There, in like manner, it must be demonstrated from the will affirmatively and clearly, that by these expressions the testator meant all the descendants of the body to take as heirs.

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There is, however, a third class of cases where a testator *uses in his will an expression, in its ordinary use not of a technical nature, and capable of more meanings than one. Now here the investigation takes a different course. It will be merely directed to the solution of the question in what sense the testator intended to use the expression, and to ascertain whether the evidence preponderates in favour of the one rather than the other meaning or meanings of the word in question; regard being always had to the *primâ facie* sense, or to that in which the word is most ordinarily used, in weighing the evidence contained in the will upon which the Court is ultimately to decide.

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The first point, therefore, to be considered is—whether “issue” be a word of this nature. Now we think that this sufficiently appears, from referring to the various authorities. The first is the statute *De Donis* (1), in which this word is used, and in which it sometimes means children, and sometimes all the descendants, according to the context in which it is found. Thus, after stating the cases of estates upon condition, &c., it proceeds thus: “In all the cases aforesaid, after issue begotten and born (*post prolem suscitata et exeuntem*) between them to whom the lands were given under such condition heretofore, such feoffees had power to alien.” There, it is plain, issue means child, for the power exists as soon as a child is born. Again, the statute speaks of land reverting to the donor: “If issue fail, in that there is no issue at all; or if any issue be, and fail by death, or heir of the body of such issue failing.” In this one sentence, the word is used in two senses: first, as intending all descendants; and secondly, as including the children only. And here too the Latin word used in the original is not “*proles*,” as before, but “*exitus*” throughout the sentence. This appears a decisive

(1) 13 Edw. I. c. 1.

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authority for its double meaning, and the books abound with others to the *same effect. In all of them it is treated as a word capable of being used in different senses, either as including all descendants, in which case it is of course a word of limitation, or as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate tail to the ancestor. It might even, perhaps, be conceded that this is *primâ facie* its meaning. But the authorities clearly shew, that whatever be the *primâ facie* meaning of the word "issue," it will yield to the intention of the testator to be collected from the will; and that it requires a less demonstrative context to shew such intention, than the technical expression of "heirs of the body" would do.

Thus in *Roe v. Grew* (1), Lord Ch. J. WILMOT says, it is a word either of purchase or limitation as will best effectuate the intention of the testator: and in *Ginger v. White* (2), WILLES, Ch. J., speaking of the word issue, says, "It does not *ex vi termini* create an estate tail in a will as 'heirs of the body' do in a deed, but only where it appears that the intent of the testator was that the word should have that construction, or at least where it does not appear that the intent of the testator was otherwise."

Again, in *Doe v. Collis* (3), Lord KENYON, after argument on this very point, says (and this shews how important a duty it is for reporters to give the argument as well as the judgment), that in a will "issue" is either a word of purchase or limitation, as will best answer the intention of the deviser, though in the case of a deed it is universally taken as a word of purchase. And in another part of the same case, comparing it with "heirs of the body," he says, that those words always give way with greater difficulty than the word "issue." And the latest case on the *subject contains a *dictum* of Sir Edward Sugden to the same effect: *Ryan v. Cowley* (4).

If this be so, the Court in the present case have to look to

(1) 2 Wils. 322.
(2) Willes, 340.

(3) 2 R. R. 388 (4 T. R. 294).
(4) Cas. temp. Sugd. 7.

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the terms in this will, in order to ascertain whether, by construing the word "issue" here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue. If it stopped there it would be an estate tail. For the word "issue" might include all descendants; and here, all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in *Shelley's* case would apply, and would convert the estate for life, previously given, into an estate tail. But the testator then adds, "and their respective heirs in such shares and proportions, and subject to such charges as he the said Henry James should by deed or will appoint." Now, according to the case of *Hockley v. Maubey* (1), the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator, that the issue and their respective heirs should take equal shares, but that Henry James should have a power of distributing amongst them the estate, in unequal shares, if he thought fit.

Now if issue be taken as a word of limitation, the word "heirs" would be first restrained to "heirs of the body," and then altogether rejected as unnecessary. The word "respective" could have no particular meaning annexed to it, and the apparent intention of the testator to give to Henry James for life, and afterwards to distribute his property in shares amongst the issue, would be frustrated. *On the other hand, if "issue" be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptation. If then the will stopped here, it would seem clear that the Court ought to read "issue" as a word of purchase.

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Then comes the devise over. "But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee."

(1) 1 R. R. 93 (1 Ves. Jr. 143).

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Now the effect of such a clause, if superadded to a remainder to children, would be to shew an intention to give a fee to the children on their attaining twenty-one. And if by the former part of the will, the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an estate tail. In fact, the case of *Doe v. Burnsall* (1) is a distinct authority on this part of the case.

Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail; and we think that we best effectuate that intention by construing the words "lawful issue" in this will, accompanied by their context, as words of purchase; and in so doing, we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words with such a context as in this will have ever been held to be words of limitation.

We therefore think for these reasons, that in this case Henry James took only an estate for life, and that there must be a decree for the plaintiff as prayed, with costs.

Decree accordingly.

1835.
Nov. 16.

TOLDERVY v. COLT.

(1 Y. & C. 621—643.)

[SEE *ante*, p. 260.]

1835.
Nov. 27.
Dec. 16.

GLYN v. SOARES.

(1 Y. & C. 644—701.)

1836.
Jan. 19.

[REVERSED on appeal to the House of Lords under the title of *The Queen of Portugal v. Glyn*, 7 Cl. & Fin. 466.]

(1) 3 R. R. 113 (6 T. R. 30).

IN THE KING'S BENCH.

AYRE *v.* CRAVEN.

1834.

(2 Adol. & Ellis, 2—9; S. C. 4 N. & M. 220; 4 L. J. (N. S.) K. B. 35.)

[2]

Declaration for slander alleged, that defendant used words imputing adultery to plaintiff, a physician; and the words were laid to have been spoken "of him in his profession." No special damage was laid.

After verdict for plaintiff, judgment was arrested, because such words, merely laid to be spoken of a physician, are not actionable without special damage: and if they were so spoken as to convey an imputation upon his conduct in his profession, the declaration ought to shew how the speaker connected the imputation with the professional conduct.

ACTION for slander. The declaration contained four counts, of which the third only was proved at the trial. The inducement to the first count stated, that the plaintiff exercised and carried on the profession of a physician at H., and that before, and at the time, &c. there was a rumour and report in and about H., and the neighbourhood thereof, that a physician residing at H. had been criminally connected with a married woman, and had been and was guilty of adultery. The third count charged, that in a discourse had in the hearing of divers, &c., and particularly J. B. and C. H. P., of and concerning the said plaintiff, so carrying on the said profession as aforesaid, and of and concerning the said rumour and report, the defendant, falsely and maliciously contriving and intending to have it believed that the plaintiff had been guilty of a criminal connexion with a married woman, in the presence, &c., spoke and published the several false, &c. words following, of and concerning the said plaintiff, so carrying on *such profession as aforesaid, and of and concerning him in his said profession, and of and concerning the said rumour and report, that is to say, "Have you heard that it is out who are the parties in the crim. con. affair that has been so long talked about?" (meaning the said rumour and report that a physician at H. had been criminally connected with a married woman). And the said C. H. P. demanded who it was; and the said defendant falsely, &c. answered, "Dr. Ayre," (meaning that the said plaintiff had been guilty of a criminal connexion with a married woman, and that

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he was the person alluded to in such rumour and report). By means of the committing, &c., the said plaintiff has been greatly injured, &c. Here followed a statement that divers persons, not named, had refused to have acquaintance with the plaintiff, or to have any transactions with him in the way of his said profession, as they were before accustomed to have, and otherwise would have had. On the trial before Taunton, J. at the York Spring Assizes, in this year, a verdict was found for the plaintiff on the above count.

In Easter Term last, *Alexander* obtained a rule calling on the plaintiff to shew cause why the judgment should not be arrested. In Trinity Term last (June 10th),

F. Pollock, Wightman, and Raines shewed cause (1):

[*4]

An action lies for imputing adultery to a medical man, such imputation being made concerning him in his profession. It directly injures him in his profession, which is the only safe criterion that can be suggested, and which will be found to agree with the decisions. Thus, *it is not actionable to say of a counsellor, "he has no more wit than a jackanapes," but it is actionable to say of him, "he has no more law than a jackanapes" (2): the reason of which distinction evidently is, that wit is not, but that knowledge of law is, essential to the profession of a counsellor. The cases are collected in Comyns's Digest, Action upon the Case for Defamation, D. 13 to D. 27, and F. 8 to F. 10, and the same principle will be found to prevail in them. It cannot be contended that an imputation of unchastity may not be so applied to a physician, as to render it highly improbable that he should be treated with that confidence which is essential to his practice. The words may be supposed to have been spoken of him so as to convey an imputation that, by taking advantage of the access allowed him to a female patient, he had intrigued with her: and after verdict, the charge set forth in the declaration may be interpreted in any way not inconsistent with the words.

(1) Before Lord Denman, Ch. J., Little-
dale, Taunton, and Williams,
JJ.

Tetley's case, Godb. 441, citing
Palmer's case (*Palmer v. Boyer*), Cro.
Eliz. 342.

(2) Per CUR. in *Cawdrey* and

Alexander and Follett (with whom was *R. Hildyard*), *contra* :

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CRAVEN.

In the introductory part of the complaint, the discourse is not said to have been of and concerning the plaintiff in his profession, but simply of and concerning the said plaintiff so carrying on the said profession, which are mere words of description. It may be doubtful whether this do not limit the effect of the whole allegation, so as to prevent the plaintiff from calling in aid the averment which occurs afterwards, applying the words spoken to the plaintiff, of and concerning him in his profession. But, independently of this difficulty, a charge of incontinence is not actionable *without special damage. This was held after verdict in *Parrat v. Carpenter* (1), although there the plaintiff was alleged to be parson of D.; and there is as much ground for saying that a clergyman would be deprived of his cure for incontinence, as that a physician would lose his practice. The cases upon this subject are collected in Selwyn's *Nisi Prius*, Slander, II. (2), in Comyns's Digest (as cited on the other side), and in Viner's Abridgment, Actions [for Words], D. a, and S. a to U. a. On reference to those authorities there will be found an universal rule, that, where words have been held to be slanderous as spoken of a physician, they have imputed want of sufficient professional acquirements or skill (3). In *Lumby v. Allday* (4), the declaration stated that the plaintiff was clerk to a Gas-light Company, and that the defendant, intending to cause it to be believed that the plaintiff was of a bad character, unfit for his situation, and an improper person to be employed by the Company, and to cause him to be deprived of his situation, used words which charged him with incontinence; and the judgment was arrested after verdict. In giving judgment, BAYLEY, J. said, "Every authority which I have been able to find, either shews

[*5]

(1) Cro. Eliz. 502. *S. C. Noy*, 64; and see *Gascoigne v. Ambler*, 2 Ld. Ray. 1004.

(2) Page 1260 to page 1267 (8th ed. 1831).

(3) As, "thou art a quack salver," Vin. Abr. Actions [for Words], (S. a), pl. 10, *Allen v. Eaton*. "Thou art a drunken fool and an ass; thou never wast a scholar, thou

art not worthy to speak to a scholar; this I will prove and justify," *Ibid.* pl. 11, *Cawdry v. Chickley*, S. C. Cro. Car. 270; and Godb. 441, pl. 509. "He is an emperic and mountebank, and a base fellow," Viner *ut sup.* pl. 12, *Goddart v. Haselfoot*.

(4) 35 R. R. 715 (1 Cr. & J. 301; 1 Tyr. 217).

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 [*6]

the want of some general requisite, as honesty, capacity, fidelity, &c., or *connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion, that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk." Words, which *may* injure a man in his profession, but which do not necessarily do so, are not actionable without special damage; they must be spoken with reference to the actual trade. A maid servant would undoubtedly be less likely to obtain a place if charged with prostitution, yet such a charge would not of itself be actionable. A schoolmistress probably would suffer in her calling, by being charged with incontinence; yet such a charge is not actionable without special damage (1). And the words, if not actionable for want of special damage, cannot be aided by an averment that they were spoken of the plaintiff in his profession, or even that they charged him with having committed the act imputed in his particular professional character. Abstaining from acts of incontinence cannot be put as part of the profession of a physician; and, consequently, the committing or not committing them has nothing to do with the exercise of the profession. The abstinence is a duty not peculiar to a physician. Morally speaking, it is the duty of all men; but the question is, whether a charge of its non-observance affords a legal ground of complaint. A merchant might be under the necessity of frequenting a house in the exercise of his trade; but *it would not be sufficient, without special damage, to aver that, in doing so, he had obtained access to a female living in the house, and had been criminally connected with her: yet this is precisely analogous to the extreme case suggested on the other side as proveable consistently with the present record. In *Hartley v. Herring* (2), where incontinence was imputed to a licensed preacher at a dissenters' chapel, the whole argument on both sides assumed the necessity of special

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(1) Per TWISDEN, J., in *Wharton Hermitage*; and 2 Show. 18, as *v. Brook*, 1 Vent. 21; and see *Wetherhead v. Brookborne*.
Wetherhead v. Armitage, 2 Lev. 233; (2) 4 R. R. 614 (8 T. R. 130).
S. C. Freem. 277, as *Witherly v.*

damage. A similar remark applies to *Moore v. Meagher* (1), and *Hunt v. Jones* (2). Unless this limitation be adhered to, that the words must refer to the actual exercise of the calling, it is impossible to say what imputation may not be held to be injurious to a man in his profession.

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Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (November 24th), delivered the judgment of the COURT :

There are obvious and very good reasons for the jealousy with which the Courts have always regarded actions of slander, particularly those in which no indictable offence has been imputed; but here the plaintiff states the grievance as affecting him in his business, office, or profession, without charging that any actual damage has accrued to him from the words spoken.

Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery (3); and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution (4). *Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay.

[*8]

The doctrine to be deduced from the older cases was recently laid down, after a full discussion, by Mr. Baron BAYLEY (5). "Every authority which I have been able to find, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business."

In that case, accordingly, where a verdict had been recovered by the clerk of a Gas Company, on a declaration alleging that the defendant, wishing to cause it to be believed that the plaintiff was unfit to hold his situation, and to cause him to be deprived of it, had said to him, "You are unfit to hold your situation," and then imputed incontinence as the reason of his unfitness, the Court of Exchequer thought the judgment ought to be arrested.

(1) 9 R. R. 702 (1 Taunt. 39).

(2) Cro. Jac. 499.

(3) *Parrat v. Carpenter*, Noy, 64;
S. C. Cro. Eliz. 502.

(4) Per TWISDEN, J. in *Wharton v. Brook*, 1 Vent. 21.

(5) In *Lumby v. Allday*, 35 R. R. 715 (1 Cr. & J. 305; 1 Tyr. 224).

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adverse to that of Williams's lessor : according to the case he proposed to prove, he might have turned Williams out ; and it makes no difference that, to save the expense of an ejectment, he gave Williams a sum of money to go out. He did not receive any transfer of a right or interest vested in Williams, but took the property as his own.

LORD DENMAN, Ch. J. :

[*20]

It appeared to me at the trial, that, as the defendant got possession under Williams, who was in possession under Bullen, the lessor of the plaintiff, he was not at liberty to question Bullen's title. I think that if we yielded to this application, we should contravene the rule that a tenant is not to dispute the *title of his landlord. The tenant would then have nothing to do, in order to bring the landlord's right into question, but to part with the property to another person.

TAUNTON, J. :

I do not apprehend the distinction which *Mr. Erle* has endeavoured to draw in this case. The defendant Mills, having paid 20*l.* for the lease, and thereupon taken possession, put himself in the situation of an assignee of that lease, and was as much estopped from disputing the landlord's title as the immediate lessee. He stands in the shoes of that party for all purposes, better or worse.

PATTESON, J. :

I cannot distinguish this case from *Doe d. Knight v. Lady Smythe* (1). It is said that Williams himself was not let into possession by the lessor of the plaintiff. But Williams did not come in under any one else ; he was in possession without leave, and when Bullen, the lessor of the plaintiff, came to him and said, " You have no right to the premises," he acquiesced, and took a lease from Bullen. The only question then is, whether the defendant came in under Williams. Now, it appears that, after having claimed the property from Williams as his right, he

(1) 16 R. R. 486 (4 M. & S. 347).

paid him 20*l.* and was let into possession. That was either an act of collusion between Williams and him, to enable him to dispute the landlord's title; or a purchase by him of Williams's interest. In either case the defence was inadmissible.

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WILLIAMS, J.:

I think this is precisely like all the other cases in which the tenant has been precluded *from contesting his landlord's title. There being a doubt who was entitled to the property, the defendant purchased the interest of a party holding under the lessor of the plaintiff. If he considered it worth while at that time to pay 20*l.* for the purpose of establishing a title, he ought not now to have the benefit of second thoughts upon the subject.

[*21]

Rule refused.

TARLETON, AND BERKLEY, ASSIGNEE OF POLLARD,
A BANKRUPT, v. ALLHUSEN AND ANOTHER.

1834.
Nov. 8.

(2 Adol. & Ellis, 32—34; S. C. 4 L. J. (N. S.) K. B. 17.)

[32]

A purchaser of goods accepted a bill for the price, which the vendor indorsed over; and the indorsee recovered judgment on the bill against the purchaser, but did not take out execution; afterwards the vendor took up the bill and received a mortgage from the purchaser, from which, however, there were no proceeds. Held, that the vendor was not, in point of law, paid for the goods.

ASSUMPSIT for goods sold and delivered. Pleas, first, *non assumpsit*; secondly, a set off for goods sold and delivered. On the trial before Lord Lyndhurst, C. B., at the last Northumberland Assizes, the counsel for the plaintiff opened the following case. The goods in question were wheat, sold by the defendants for Tarleton *and Pollard, who had previously purchased the same wheat from the defendants at a higher price than it produced on the ultimate sale. The price at which Tarleton and Pollard purchased remained unpaid, except so far as it was covered by the following transaction. Tarleton accepted a bill for 1,800*l.*, which was handed over by Pollard to the defendants; and this, according to the plaintiffs' statement, was given and taken as applicable to part of the price of the wheat, which considerably

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TARLETON
v.
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exceeded 1,800*l.*; but the defendants insisted that the wheat was sold by them to Pollard only, and that they took the bill from Pollard as applicable to his general account, he being previously indebted to them in more than that amount. The bill was indorsed over by the defendants to Messrs. Backhouse & Co., who recovered judgment upon it, when due, against Tarleton. No execution was ever put in force upon this judgment; but the defendants took the bill up, and afterwards took from Tarleton a mortgage of certain property to the amount of the bill, from which mortgage, however, they had received no proceeds. On this statement, the LORD CHIEF BARON nonsuited the plaintiffs.

F. Pollock now moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial had:

The plaintiffs having been nonsuited on the opening of their own counsel, it may be assumed, for the purpose of the present motion, that the bill was given, as the plaintiffs say, to be applied to the price of the wheat, on the original purchase by Tarleton and Pollard, and on behalf of the two. The question is, whether this really amount to part payment: for, if not, it must be admitted that the plaintiffs cannot say that the wheat, *at the time of the last sale by the defendants, was the property of Tarleton and Pollard; or, at any rate, the defendants might claim to be unpaid vendors in possession, with a lien on the wheat; and, in either view of the case, they need not use their plea of set-off.

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(PATTESON, J.: If they were unpaid vendors upon credit, they would have no lien, and then the plea would be necessary.)

On any view of the case, the question is now whether, the defendants having received this bill for 1,800*l.*, and having indorsed it over, and judgment having been recovered upon it against the acceptor, they are not, as between themselves and the acceptor, precluded from denying that they have received this 1,800*l.* They have enabled Backhouse & Co. to establish a judgment debt against Tarleton, who is now no longer liable to be sued upon the bill. How can a man owe a debt, when the

security, which has been given in payment for it, has been enforced, and is itself no longer capable of being the subject of an action?

TABLETON
v.
ALLHUSEN.

LORD DENMAN, Ch. J.:

It was at one time supposed that the law was as *Mr. Pollock* puts it (1); but there is now no doubt that judgment without satisfaction is no payment. We cannot grant the rule, unless some authority be shewn for it.

TAUNTON, PATTESON, and WILLIAMS, JJ., concurred.

Rule refused.

BIRCH, ADMINISTRATOR OF VINCENT, v. DAWSON.

(2 Adol. & Ellis, 37—41; S. C. 4 N. & M. 22; 4 L. J. (N. S.) K. B. 49.)

1834.
Nov. 8.

[37]

A. bequeathed his leasehold messuage, with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures and fixed furniture, to V. for life; and the household goods, furniture, plate, linen, china, books, wines, and liquors, and other properties in the messuage, not being comprehended under the preceding terms, "fixtures and fixed furniture," to V. absolutely. There were in the messuage looking-glasses, standing on chimney pieces, and nailed to the wall; and a book-case, standing on (but not fastened to) brackets, and screwed to the wall: Held, that V. took only a life interest in these.

DETINUE for looking-glasses and a book-case. On the trial before Littledale, J. at the sittings in Middlesex, in this Term, it appeared that the plaintiff claimed, as administrator of Elizabeth Sarah Vincent, under the will of George Dawson. The will contained the following clauses: "I give and bequeath unto my son G. P. Dawson and to Frederick Bossy, my leasehold messuage, being, &c., with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures and fixed furniture therein, and also the household goods, furniture, *plate, linen, books, china, wines, and liquors therein at the time of my decease, upon the trusts herein-after declared of and concerning the said

[*38]

(1) See the arguments and judgments in *Drake v. Mitchell*, 7 R. R. 449 (3 East, 251). [And see cases there cited, as following the judgment; and see also *Wegg-Prosser v.*

Evans, '95, 1 Q. B. 108; 64 L. J. Q. B. 1, C. A.—overruling *Cambefort v. Chapman* (1887) 19 Q. B. D. 229, 56 L. J. Q. B. 639.—R. C.]

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leasehold messuage, fixtures, and fixed furniture, upon trust to permit Elizabeth Susan Vincent to have the use and enjoyment thereof during her life, she paying &c.; and as to the said household goods, furniture, plate, linen, china, books, wines, and liquors, and other properties in that messuage not being comprehended under the preceding terms fixtures and fixed furniture, in trust for the said E. S. V. absolutely as her own property." The looking-glasses stood on the chimney pieces, and were fastened by nails on each side to the wall. The book-case stood in a recess, which it did not fit, upon brackets which were fixed to the wall, but to which it was not attached; and it was fastened above by a screw to the wall, in order to prevent it from falling. The learned Judge, being of opinion that these articles came within the terms "fixtures and fixed furniture," nonsuited the plaintiff.

G. T. White now moved for a new trial:

The particular words used in conjunction with the general words "fixtures and fixed furniture" will restrain the latter, which can only apply to things *ejusdem generis* with the former. * * *

[40]

LORD DENMAN, Ch. J.:

The will mentions three classes of articles; fixtures, fixed furniture, and furniture not fixed. We must see what will answer to each of these three classes. Bells and other fixtures constitute the first. The articles which may be removed by the hand at once constitute the third. The intermediate class is furniture which is fixed; and that appears to me to comprehend the articles in question.

TAUNTON, J.:

I perfectly agree with *Mr. White*, that looking-glasses and book-cases are not only not specifically the same as grates, stoves, and the other articles enumerated in the earlier part of the will, but also that they are not *ejusdem generis* with such articles. But I know of no rule which lays down that, when such general words as we have in this case occur, their application is to be

limited to things *ejusdem generis* with those which have been before enumerated. We are, therefore, at liberty to consider the only real question in this case; that is, whether looking-glasses and book-cases are “fixed furniture,” in the sense in which the testator has used the words. Now it is clear that by “fixed furniture” he meant something besides mere fixtures. Are not looking-glasses furniture? and are not these looking-glasses fixed? If so, are they not fixed furniture? I think that fastening the glasses by nails, and the book-case by a screw, makes them fixed. Both descriptions, therefore, concur.

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v.
DAWSON.

PATTESON, J.:

The testator has chosen to use expressions which are new; but it is clear that he makes a distinction between fixed furniture and furniture which is not fixed. The furniture in question is fixed. It may, indeed, be said that “fixtures” must mean only articles of the same kind with those before enumerated; but the “fixed furniture” is another thing altogether.

[41]

WILLIAMS, J.:

I entirely agree. *Mr. White* is driven to contend that, in this will, “fixtures” and “fixed furniture” mean the same thing; whereas it is obvious that the words are used in express contradistinction; just as, on the other hand, the “fixed furniture” is opposed to books, wines, &c., which are not fixed at all. The argument as to “fixtures” is therefore inapplicable.

Rule refused.

PHILPOTT v. JONES (1).

(2 Adol. & Ellis, 41—44; S. C. 4 N. & M. 14; 4 L. J. (N. S.) K. B. 65.)

Plaintiff, in an action of debt, proceeded for 18*l.*, but delivered a particular of demand, containing items to the amount of 11*l.* for spirits supplied in quantities not amounting to 20*s.* at a time and 23*l.* 2*s.* for other articles. It appeared at the trial that defendant had paid plaintiff

1834.
Nov. 10.

[41]

(1) Cited by STIRLING, J. in *Friend v. Young*, '97, 2 Ch. 421, 437; 66 L. J. Ch. 737, 747.—R. C.

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v.
JONES.

17*l.*, but there was no proof of any appropriation of the payment by either. The jury found that the plaintiff had appropriated 11*l.* of the 17*l.* already paid, to the demand for spirits, and they gave him a verdict for 17*l.*

Held, that such finding was not in contravention of stat. 24 Geo. II. c. 40, s. 12, which prohibits any recovery for spirituous liquors unless the debt shall have been contracted at one time to the amount of 20*s.*

DEBT for goods sold, meat, drink, &c. provided, and for money paid, and on an account stated. The defendant pleaded, among other pleas, a set-off; and, as to the goods and drink, that the same consisted wholly of spirituous liquors; and that there was not at any one time any debt contracted for the same, or any part thereof, to the amount of 20*s.* or upwards. The plaintiff, by his replication, denied the matter of both pleas. The amount indorsed on the bill of summons, as claimed in the action, was 18*l.*; and the plaintiff delivered a particular of demand to that amount. He afterwards, *under a Judge's order, delivered a fuller particular, which contained an account of spirituous liquors supplied to the defendant on different days, at a rate never amounting to 20*s.* in a day, but forming a total charge of 11*l.* 2*s.*; and there was also an account of other articles, amounting to 23*l.* 2*s.* At the trial before the under-sheriff of Middlesex, by writ of trial, in the last vacation, it appeared that the defendant had paid the plaintiff 17*l.* on the account between them; but there was no proof that either party had said any thing of applying the money so paid to any specific part of the demand. The defendant's counsel contended that he had a right to consider the demand of 11*l.* 2*s.* for spirits as forming part of the residue of 17*l.* claimed by the plaintiff, after allowing for the 17*l.* already paid; in which case the stat. 24 Geo. II. c. 40 (1), would apply, and the plaintiff's claim must be further reduced by 11*l.* 2*s.* The under-sheriff left it to the jury, whether the plaintiff, when he received the 17*l.*, appropriated 11*l.* 2*s.* of it to the payment of his demand for spirits; directing them, if they

[*42]

(1) Stat. 24 Geo. II. c. 40, s. 12 (repealed in part by 25 & 26 Vict. c. 38), enacts, that no person "shall be entitled unto or maintain any cause, action or suit for, or recover either in law or equity, any sum or

sums of money, debt or demands whatsoever, for or on account of any spirituous liquors, unless such debt shall have been really and *bonâ fide* contracted at one time, to the amount of 20*s.* or upwards."

so found, to give the plaintiff a verdict for 17*l*. The jury were of opinion that the appropriation was made, and they found their verdict accordingly for 17*l*.

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v.
JONES.

Mansel now moved for a new trial, or (by leave reserved) to reduce the damages :

This is not a case in which an appropriation by the creditor ought to *have been presumed. The plaintiff, by proceeding for only 18*l*., gives general credit for a certain sum received : by inserting in his particular all the items of demand, up to 34*l*., he admits that there has been no specific appropriation. The statute says expressly, that no person shall recover any sum or demand for spirituous liquors, unless such debt shall have been contracted at one time to the amount of 20*s*. By allowing the plaintiff to say now that the former payment was appropriated to this part of his claim, he would in effect be enabled to recover in contravention of the statute, and upon a consideration which the statute, in effect, renders illegal.

[*43]

(TAUNTON, J. : He did not recover for the spirits in this action, if the jury were of opinion that he had been paid for those already.)

The plaintiff ought to have shewn that he appropriated the payment.

LORD DENMAN, Ch. J. :

If this action were brought for the 11*l*. 2*s*. claimed for spirits, the statute would be an answer : but the action is not brought for that ; the plaintiff seeks to recover what is due after that has been paid. The question is, whether the jury were warranted in saying that the former payment was on account of the spirits. The defendant made no appropriation of that payment ; the plaintiff, therefore, might elect at any time to appropriate it to this part of his demand.

TAUNTON, J. :

The spirits have, in this case, been excluded from the verdict. The rule is, that if a debtor pays money on account, and does

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[*44]

not at the time state how it is to be applied, the creditor may make the appropriation. Here, the 17*l.* was paid without any application *to particular items of the account. The plaintiff then might apply that payment to the items in question: and he was not bound to tell the defendant, at the time, that he made such application; he might make it at any time before the case came under the consideration of a jury. There is, therefore, no "action maintained," or "recovery," for the spirits, in this case, according to the terms of the statute; and there is no provision in the Act that a party having been paid for spirits supplied in the quantities there mentioned, shall be liable to refund. The defendant, if he wished to avail himself of the Act, should have appropriated the payment at the time of making it.

WILLIAMS, J.:

The objection is, that this action may be considered as brought for the particular part of the account to which the statute would apply: but the defendant has disarmed himself of this objection by not appropriating the payment when he made it. The payment, having been made on account of the spirits, is valid; he could not have brought an action to recover the money back.

Rule refused.

1834.
Nor. 10.

[45]

EX PARTE LAW.

(2 Adol. & Ellis, 45—48; S. C. 4 N. & M. 7; 4 L. J. (N. S.) K. B. 18.)

A testator died, indebted to an attorney for law expenses, including the preparation of his will, which was left in the custody of the attorney: the Prerogative Court having cited the attorney (at the instance of the personal representatives) to bring in the will and leave it in the registry of that Court, the Court of King's Bench refused, in this stage of the proceedings, to interfere by prohibition, on the ground of the attorney's claim to a lien on the will.

WIGHTMAN had obtained a rule, in Trinity Term last, calling upon Mary Wood to shew cause why a writ in the nature of a writ of prohibition should not issue to the Judge of the Prerogative Court of Canterbury, commanding him to stay all

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further proceedings against John Law in the matter of Joseph Wood deceased, until the lien of him, John Law, and of Richard Coates on the will of Joseph Wood should have been satisfied or discharged. The affidavits in support of the rule stated that Law and Coates were attorneys, and had been employed as such by Joseph Wood deceased; that J. W., at the time of his death, owed them 200*l.* for business done, including the preparation of his will; that J. W. deposited the will with Law and Coates; that it remained in their custody till the dissolution of partnership between Law and Coates; and that since the dissolution, and up to, and always since, the time of J. W.'s death, it had remained in the custody of Law; that application had been made, soon after the death of J. W., to Law, by the son and son-in-law of J. W., on behalf of Mary Wood the widow of J. W., to know if the will was in his custody, which Law admitted, but insisted upon having his account settled before the will was given up, upon which they directed him to make out his bill; that Law gave them a copy of the will; that afterwards Mary Wood made a written application to Law to have the will delivered to her, and the bill sent in; that Law subsequently delivered the bill of costs, but persisted in *his refusal to deliver up the will till his account was settled, whereupon he was served with a citation from the Prerogative Court of Canterbury, at the instance of Mary Wood, requiring him to appear in that Court, and bring in and leave in the registry of that Court the original will. Law further deposed that he was advised that he and Coates had a lien on the will at common law, but he was informed that the Prerogative Court would decree that he should give up the will without payment of his bill of costs. It was further sworn that Sir JOHN NICHOLL, the Judge of the Prerogative Court, had, on a day subsequent to the day on which the citation required the will to be brought in, declared, upon the case being mentioned, that the claim of lien was no excuse for not bringing in the will; and that, if it was not brought in on or before the next sitting of the Court, he should pronounce Law to be in contempt.

[*46]

Follett now shewed cause :

The Prerogative Court has an exclusive jurisdiction as to the

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LAW.

probate of wills, or compelling the production of them: this Court, therefore, will not interfere by prohibition, which is a proceeding applicable properly to cases where the Spiritual Court is exceeding its jurisdiction. As to the question of lien, this Court, if a proper case should appear, may interfere when the question arises; but they will not anticipate it.

Wightman, contrà :

[*47]

It is true that the Spiritual Court has exclusive jurisdiction; but the question here is, whether the Court of King's Bench will interfere to prevent the Spiritual Court from proceeding in derogation of *the common law. In a tithe suit, this Court interferes when a question of modus, or other matter of common law, arises. Here a lien is claimed, which is matter of common law. If this application were to fail, an attorney's lien on a will would be altogether nugatory.

LORD DENMAN, Ch. J. :

Your application goes to prevent the Spiritual Court from even having the will brought in till the lien is satisfied. You do not call on them not to keep it in the registry. We cannot presume that, when they have ordered the will in, they will do any thing improper. Supposing the question of lien to arise, we should see whether we could give effect to the right without injuring parties.

TAUNTON, J. :

There is clearly no ground for this application. It is assumed that the Prerogative Court are going to act in derogation of the course of common law; that is, that they will try the right of lien. I know that when a Spiritual Court proceeds to try a custom, or other similar question, this Court will interfere. But at present, it does not appear that anything is going to be done in derogation of the common law. The Spiritual Court has not only jurisdiction over wills, but exclusive jurisdiction; and they are not exceeding that jurisdiction when they order the will to be brought in. We cannot act upon the mere suggestion that it is

likely they will proceed as this Court would not proceed. I trust that the Spiritual Court will hold the will to be in the possession of the parties who are entitled to it.

Ex parte
LAW.

WILLIAMS, J.:

[48]

No ground has been shewn for this application. We cannot say that the Spiritual Court will proceed improperly. Admitting that it is the proper place for the custody of wills, it is too much to say that we are to prevent their having that custody on the supposition that the rights of parties will be injured. The usual case of a prohibition being granted is, where there is either a proceeding contrary to common law, or cognisance taken of that which is cognisable only at common law.

Rule discharged with costs.

MACARTHUR v. CAMPBELL.

(2 Adol. & Ellis, 52—56; S. C. 4 N. & M. 208; 4 L. J. (N. S.) K. B. 25.)

1834.
Nov. 10.

[52]

On a motion for an attachment for not performing an award, the Court will not discuss objections to the award, not apparent on the face of it; as, that the arbitrator was partial, or that matters were brought before him (the reference being of all matters in difference) which are not disposed of by the award.

ASSUMPSIT. Plea, the general issue. On the 18th June, 1832, by an order of Lord TENTERDEN, the cause, and all matters in difference between the parties, were referred to an arbitrator; the costs of the suit and of the reference to abide the event of the award. The order was made a rule of Court, 19th April, 1833. The arbitrator awarded, 12th November, 1832, “that there is not any sum or sums of money due and owing from the said H. D. Campbell to the said John M’Arthur; nor did the said H. D. Campbell undertake or promise in manner, &c.” The costs of the cause and reference were taxed at 10*l.* 10*s.* In Easter Term, 1833, the plaintiff obtained a rule to set the award aside, which was discharged in Michaelmas Term, 1833 (1), on account *of the lateness of the application. In Easter Term last,

[*53]

(1) See *Macarthur v. Campbell*, 39 R. R. 557 (5 B. & Ad. 518).

MACARTHUR *Miller* obtained a rule to shew cause why an attachment should
 CAMPBELL. not issue against the plaintiff for not paying the costs. The affidavits in opposition stated that the defendant made a claim of set-off before the arbitrator, of which the award had taken no notice. The set-off had not been pleaded, nor notice given of it, in the original action. The sum claimed by the plaintiff was 8*l.* 17*s.*; the sum claimed in the set-off was 20*l.* 11*s.* 1*d.* The affidavits also contained statements imputing partiality to the arbitrator.

Follett and *W. H. Watson* now shewed cause :

If the arbitrator had found for the plaintiff, it would have appeared that he had arbitrated on all submitted to him : so if the arbitrator had awarded general releases : *Wharton v. King* (1). But the present award is not final ; for the set-off may be still the subject of a future action against the plaintiff ; and, if the award were pleaded in bar to such action, it would be a good replication, that the award did not dispose of all matters in difference. The objection to the award, as not being final, might have been pleaded to an action brought upon it, as was allowed in *Cargay v. Aitchison* (2), in conformity with *Mitchell v. Staveley* (3) ; it ought, therefore, to be held a sufficient answer to an application for an attachment : *In re Cargay* (4). On the former motion in this case (5), the Court considered the application to set aside the award to be too late, although *Musselbrook v. Dunkin* (6) appears to be an authority to the contrary : but this does not shew that the objection may not be insisted upon in opposing an application for an attachment, which is not a strict matter of right, but a proceeding in the discretion of the Court ; and the present is, at any rate, a case of sufficient doubt to induce the Court to withhold the summary remedy. With respect to the objection of partiality, it perhaps could not be regularly pleaded in answer to an action ; but the want of finality makes the award altogether void. If the order of reference had

(1) 36 R. R. 643 (2 B. & Ad. 528).

(4) 2 Dowl. & Ry. 222.

(2) 26 R. R. 298 (2 B. & C. 170).

S. C. affirmed in error, in Ex. Ch. 2 Bing. 199).

(5) *Macarthur v. Campbell*, 39 R. R. 557 (5 B. & Ad. 518).

(6) 35 R. R. 637 (9 Bing. 605).

(3) 14 R. R. 287 (16 East, 58).

specifically noticed the set-off, there can be no doubt, on the authority of *Randall v. Randall* (1), that the attachment would have been refused. In *Winter v. Munton* (2), the objection, that matters in difference were not noticed, was raised by affidavit; though it is true that that was on motion to set the award aside.

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v.
CAMPBELL.

Sir J. Scarlett and Miller, contra:

It is not contended that the award is bad upon the face of it, or even doubtful; and if any objection, not appearing on the face of the award, be raised, that must be done by motion to set aside the award; otherwise a party, against whom an award was made, might easily evade it, by neglecting to make any objection within the time for setting it aside, and then filing affidavits in answer to the motion for an attachment, which could not be answered. Neither ought it to be assumed that the defendant could sue on the matters included in the set-off: it might be shewn in answer that the set-off was before the arbitrator, in the same way as it may be shewn that a set-off *was brought before a jury, by plea or notice, and that the jury nevertheless found for the plaintiff.

[*55]

LORD DENMAN, Ch. J.:

It is said in 1 Tidd's Practice (3), "The Courts will not set aside an award, though for defects appearing on the face of it, after the expiration of the time limited by the statute (4); and a party cannot, in shewing cause against an attachment, impeach the award for any intrinsic" (where we should read "extrinsic") "matter. But, upon an application for an attachment for non-performance of an award, it is competent to the parties to object to the award for any illegality apparent on the face of it, although the time limited by the statute for applying to the Court to set aside the award, is expired: the reason is, that upon a motion for an attachment, the party would be without remedy, if the attachment were granted, notwithstanding the illegality of the

(1) 8 R. R. 601 (7 East, 81).

(2) 19 R. R. 560 (2 B. Moore, 723).

(3) Chap. 36, p. 845, 9th edit. 1828.

(4) 9 & 10 Will. III. c. 15, s. 2.

[Repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 26. But see R. S. C. Ord. 64, r. 14.—R. C.]

MACARTHUR award; whereas, if the party were left to his remedy, by bringing his action on the award, it would be competent to the defendant to take advantage of any illegality appearing on the face of it." Numerous cases, which are referred to in Tidd (1), establish the principle, that an objection upon the face of the award may always be taken advantage of; but that objections arising *dehors* must be made within the limited time. In the case which was before us a twelvemonth ago (2), the Court decided that they would not allow an award to be set aside after the statutory time; and it would be too much to allow a longer time *for making extrinsic objections to an attachment, by affidavits in answer to the application. The attachment must therefore fall within the general rule, according to the principle laid down in Tidd.

[*56]

TAUNTON, J. :

I entertained some doubt on one point only. Well knowing, as I do, that the previous decision (2) in this case was correct, I still thought that, perhaps, the Court might, on the present application, look at the circumstances, to guide them in the exercise of this their discretionary power. But, on consideration, I think it best to be guided by the plain rule, rather than by accidental circumstances. This is an objection raised on matters extrinsic to the award, and it comes too late. I understand the distinction to be as stated by my Lord.

WILLIAMS, J. :

I am of the same opinion. A contrary decision would invert the regular order of proceedings, and would make every motion for an attachment an opportunity for discussing questions which ought properly to be raised by motion for setting aside an award.

Rule absolute.

(1) See also *Manser v. Heaver*, 37 R. R. 426 (3 B. & Ad. 295).

(2) *Macarthur v. Campbell*, 39 R. R. 557 (5 B. & Ad. 518).

BETTS AND DREWE v. GIBBINS (1).

(2 Adol. & Ellis, 57—77; S. C. 4 N. & M. 64; 4 L. J. (N. S.) K. B. 1.)

1834.
Nov. 11.

[57]

Defendant sold ten casks of goods to N., and sent them to plaintiffs, with notice that they were for N., and ordering plaintiffs to separate them from other articles sent at the same time, and to have them taken away distinctly from those. After they were separated, N. took away two casks. Defendant then ordered plaintiffs not to deliver the remaining eight to N., but to another person, which order plaintiffs obeyed. N. becoming bankrupt, his assignees sued plaintiffs in trover for the eight casks. Plaintiffs wrote to defendant, stating that they looked to him for indemnity; and inquiring whether they should defend, and stated that they should settle the action, in default of receiving instructions from him. Defendant denied his liability to indemnify, though he said he was advised the action could not be defended, but he offered to place eight fresh casks of the same article in the plaintiffs' hands. Plaintiffs received the casks, and offered them to the assignees; who, two months after, refused to accept them. Plaintiffs then paid the sum claimed, and costs, to the assignees, and sued defendant for the sum paid and the costs of the action, declaring upon promises to indemnify, in consideration of their not delivering the casks to N., and delivering them to another person: Held,

1. That a promise to indemnify to the full amount claimed might be implied from the facts.

2. That, whether the right of stoppage as against N. was determined or not, the detaining the goods by the plaintiffs was not such an evidently unlawful act as entitled the defendant to resist the action as an attempt to enforce contribution or indemnity among wrongdoers.

3. That the taking of the last eight casks by the plaintiffs, and offering them to the assignees, was not a waiver or satisfaction of the plaintiffs' claim against the defendant.

Letters between N. and defendant, respecting the original contract and the disposal of the casks, not communicated to the plaintiffs, were offered by the defendant in evidence. *Quare*, whether they were admissible?

ASSUMPSIT. The first count of the declaration alleged that in consideration that the plaintiffs, at the defendant's request, would refuse to deliver certain goods to Messrs. Nyren and Wilson, and would deliver them to another person, the defendant undertook to indemnify them for so doing; and the count averred such refusal and delivery; it then stated that an action was commenced by the assignees of Nyren and Wilson,

(1) Followed in *Dugdale v. Lovering* (1875) L. B. 10 C. P. 196, 44 L. J. C. P. 197. Distinguished by BRUCE, J. in *The Englishman and The Australia* (No. 2), '95, P. 212, 64 L. J. P. 74; 72 L. T. 203; cited by KENNEDY, J. in *Burrows v. Rhodes*, '99, 1 Q. B. 816, 829, 68 L. J. Q. B. 545, 551.—R. C.

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[*58]

who had become bankrupts, against the plaintiffs, for not delivering the goods to N. and W.; and that the plaintiffs, to prevent further proceedings, paid a large sum of money. Breach, that the defendant would not indemnify them in respect of that sum. The cause of action was differently stated in several other special counts, but they all proceeded on an alleged promise to indemnify. On the trial before Denman, Ch. J. at the sittings in London after Trinity Term, 1883, a verdict *was taken for the plaintiffs, with 157*l.* 5*s.* damages, subject to the opinion of the Court on a case, which was substantially as follows :

The plaintiffs carry on business as bargemasters and wharfingers at Bristol and London. The defendant is a manufacturing chemist at Neath in Glamorganshire. Of the letters herein-after mentioned, those which passed between Nyren and Wilson and the defendant were produced at the trial by the defendant, without any proof that they had been communicated to the plaintiffs; and the reception of them being objected to, their admissibility was ordered to form a question in the case. On the 9th of August, 1880, Messrs. Nyren and Wilson, who were colour-merchants in London, wrote to the defendant, inquiring when, and at what price, he could supply them with five tons of acetate of lime, to be delivered to them at a wharf in London. The defendant offered to supply them with the quantity required, at a given price, to be paid by a bill at four months on delivery; and on the 19th of August, 1880, Nyren and Wilson wrote to the defendant, accepting his proposal. The defendant, on or about the 9th of October, sent the cargo ordered, namely, five tons of acetate of lime, in ten casks, from Neath to Bristol, to be from thence forwarded by the plaintiffs' boats to London; and he thereupon wrote a letter to the plaintiffs as follows, dated 9th October, 1880:

[*59]

"There are some casks gone on by your boats to wait my orders in London; and I wrote to your house in Bristol, directing that thirty casks (C. 1 and C. 30), containing liquid, should be for Mackmurdo and Pitchford, and ten hogsheads (C. 160 and C. 169), of dry goods, gross five tons," &c., "should be for Nyren and Wilson; *and as other casks are also gone forward, I shall be obliged by your carefully separating the

above for the parties mentioned, and having them taken away distinct from any others; for I am fearful that there may be some confusion in the business; and shall thank you to address me a few lines, per post, stating that this is done, and informing me the marks of the other casks which you have received to my orders."

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On the 12th of October, the defendant drew a bill of exchange on Nyren and Wilson, at four months date, for 161*l.* 1*s.* 2*d.*, being the amount of the price of the five tons of acetate of lime and the casks, and transmitted it to them for acceptance in a letter dated the same day. Nyren and Wilson did not either accept the bill or return it to the defendant; nor did they pay it at maturity, nor otherwise pay the price of the acetate of lime and casks, although often applied to.

On or about the 20th of October, 1830, Nyren and Wilson made application respecting the above consignment, and at that time took away two of the ten casks of acetate of lime.

On the 2nd of November, 1830, whilst the remaining eight casks were still upon the plaintiffs' wharf, Thomas Gibbins, the brother of the defendant, acting on his behalf and by his authority, personally gave directions to the plaintiffs not to deliver the remaining casks to Nyren and Wilson, but to deliver them to the order of John Elliott; and he also on the same day signed an order, which was delivered to the plaintiffs, directing them to deliver the eight casks to the order of Elliott. This order was afterwards duly indorsed by Elliott, thus: "Deliver the eight casks to S. Moline.—JOHN *ELLIOTT." Pursuant to this order and the indorsement, the plaintiffs delivered the eight remaining casks of acetate of lime to Sparks Moline, the indorsee.

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On the 3rd of November, 1830, the defendant wrote to Messrs. Nyren and Wilson, informing them that, not having had a bill from them, he had disposed of the eight casks elsewhere, and requesting them to cancel his draft and invoice, and remit for the two casks.

A commission of bankruptcy having issued against Nyren and Wilson, the plaintiffs, on or about the 29th of October, 1831, received a note from Messrs. Fyson and Beck, solicitors

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to the assignees, demanding the eight casks, and giving notice that, in the event of their refusal to deliver the same, an action of trover would be forthwith commenced against them by the assignees.

A copy of this notice was forwarded to the defendant at Neath on the 3rd of November, 1831, by Messrs. Vandercom and Comyn, the attorneys of the plaintiffs, in a letter containing the following passage: "As you only are interested in the dispute, and Messrs. Betts and Drewe look to you for their indemnity, we beg to inquire on their part what you intend to do under the circumstances; whether you wish the threatened action to be defended, or you will comply with the demand, by sending eight hogsheads in lieu of those delivered to the order of Mr. Elliott, that Messrs. Betts and Drewe may hand them over to the assignees as required." The letter also requested certain information in the event of the defendant determining that the action should be resisted; and there was the following postscript: "Since writing the enclosed, *the assignees have commenced their action by serving Messrs. Betts and Drewe with a writ: you will therefore give the matter your immediate attention."

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To this letter no answer was returned; and on the 10th of November, 1831, the plaintiffs' attorneys wrote to the defendant, expressing their surprise, and adding, "We have to inform you that, as the plaintiffs are proceeding in their action against Messrs. Betts and Drewe with all possible speed, we shall advise these gentlemen to settle the action and hold you answerable for the consequences, unless we hear from you satisfactorily by return of post."

On the 17th November, 1831, the defendant wrote to the plaintiffs a letter containing the following passage: "I have received application from your solicitors for the return of eight casks of acetate of lime, in lieu of those intended to be delivered to Nyren and Wilson about this time last year. I have laid the whole case before my own solicitor; and, although I am advised that the action brought by Nyren and Wilson's assignees cannot be successfully defended, I do not consider myself liable to you: but, from other considerations, I am willing to interpose

in your behalf, and, in a reasonable time, to restore eight casks to your care, by your allowance of the charges for rent &c., paid on the former."

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On the 19th of November, the defendant did ship for the plaintiffs eight casks of acetate of lime, which were duly received by the plaintiffs in London. The plaintiffs' attorneys, on the receipt of the above letter, offered to deliver to the assignees the eight casks so proposed to be substituted; and this offer being rejected, they, to *prevent further expense, paid over the fair estimated value of the acetate of lime, and the costs of the action brought by the assignees, which, together with their own costs, amounted to the sum for which the verdict in the present action was taken.

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In about two months after the substituted eight casks were received by the plaintiffs, an account of such payment was transmitted to the defendant. The plaintiffs had also, before paying the said sum to the assignees, transmitted to the defendant a copy of a letter received by them from their attorneys (dated 18th January, 1882), which stated that "the assignees, after having taken the interval between the communication of the proposal to transfer the fresh casks, and that day, to consider the proposal, had that day sent them an answer, that the assignees would not accept the terms, but would proceed with the action;" and the letter from the plaintiffs' attorneys advised the plaintiffs to pay the assignees the value of the eight hogsheads at once, with the costs incurred to that time. The above was accompanied by a letter from the plaintiffs to the defendant, as follows: "January 21, 1882. We have this day received a letter from our solicitors, of which the annexed is a copy; and, as we have acted entirely under your instructions in this transaction, we hope you will remit us or them the amount required immediately, as it seems worse than useless to defend the action or spend more money. Your answer by the return of post will very much oblige."

In answer to which, on the 23rd of January, the defendant wrote to the plaintiffs as follows: "We complied with your request against our interest in sending you *eight casks of

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acetate of lime. We decline doing more. We by no means regard you as acting under our instructions."

The defendant proved, under Nyren and Wilson's commission, a debt of 161*l.* 1*s.* 2*d.*, being the price charged for the ten casks of acetate of lime mentioned in the defendant's letter of the 9th of October, 1830. But such proof was made after the eight casks of acetate of lime had been transmitted to and received by the plaintiffs, and after the letter of the 3rd of November, 1831, and before the present action was commenced; no application having at that time been made by the plaintiffs to the defendant subsequent to the receipt by the plaintiffs of the last eight casks.

The questions for the opinion of the Court were,

First, whether the correspondence between Nyren and Wilson and the defendant was admissible in evidence; and, secondly, whether the defendant was liable to repay to the plaintiffs the sum paid by them to the assignees, and the plaintiffs' costs of the said action. If the Court should be of that opinion, the verdict was to stand; if not, a verdict to be entered for the defendant.

Chilton, for the plaintiffs:

[*64] It is not necessary to enter into the question of the admissibility of the letters. Even supposing them admissible, they amount only to transactions passing behind the backs of the plaintiffs, and cannot affect their rights. The defendant is liable at all events. In the letter of 9th October, 1830, he tells the plaintiffs that the casks are waiting his orders; he directs them to separate the casks for the parties, and to have them taken away; and he speaks of other casks received for his orders. He, therefore, cannot *deny that the plaintiffs were bound to obey his directions respecting the casks; and this is consistent with all that follows. On the 2nd of November, 1830, he orders them not to deliver the remaining eight casks to Nyren and Wilson, giving on the same day an order to deliver them to another party; and the phrase "remaining" shews that he then knew of the delivery of the two. On the 3rd of November, 1831, the defendant receives

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from the plaintiffs notice that proceedings are commenced against them, and that they look to him for indemnity, and request instructions. On the 10th of November, 1831, no answer having been given to the last letter, the subject is pressed again upon the defendant, and he is told that the plaintiffs will be advised to settle the action, and that he will be held answerable. On the 17th of November, 1831, he writes back that he is advised that the action cannot be successfully defended, and that he does not consider himself liable to the plaintiffs; but proposes a compromise with the assignees, which the latter do not accept. Then the plaintiffs pay the money, which was their only course. At the trial it was urged, on behalf of the defendant, first, that if there was a right of stoppage *in transitu*, the plaintiffs ought to have defended the action; and, secondly, that if there was no such right, they were wrongdoers in withholding the casks, and that neither contribution could be claimed, nor promise of indemnity implied, among tortfeasors. The answer is, first, that the defendant's letter of the 17th of November, 1831, absolves the plaintiffs from defending the action, even if there was a defence; and, secondly, that the rule as to tortfeasors is not so unqualified as the defendant's argument would require it to be. On this last point, *Merryweather v. Nixan* (1) was cited at the trial for the defendant, where one of two parties, against whom jointly there had been a recovery in an action of tort (for injury to a mill), sued the other for contribution, and was nonsuited: but there Lord KENYON distinguished the case from cases of indemnity where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right.

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(TAUNTON, J.: *Merryweather v. Nixan* (1) is rather an unsatisfactory case: it is shortly reported, and the nature of the injury does not appear.)

In that case, *Philips v. Biggs* (2) was mentioned, in which no decision is given, and it is said that the Court doubted, and likened the case of the two sheriffs of Middlesex, in an action for

(1) 16 R. R. 810 (8 T. R. 186).

(2) *Hardres*, 164.

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escape, to that of two joint obligors. In *Adamson v. Jarvis* (1) the COURT, in giving judgment, said, "Every man who employs another to do an act which the employer appears to have a right to authorise him to do, undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have:" and they confined the doctrine, that wrongdoers cannot have redress or contribution, as against each other, to cases where the person seeking redress must have known that he was doing an unlawful act. In *Colburn v. Patmore* (2) the proprietor of a newspaper sued his editor for inserting a libel without the knowledge of the plaintiff, for which the plaintiff had been convicted and fined; and Lord LYNDEHURST said, "I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover *damages against another who has participated in its commission:" but there the plaintiff was an actual criminal; and, indeed, the decision of the case was founded on a distinct ground. In *Humphrys v. Pratt* (3) the House of Lords held that a sheriff, who, at the request of an execution creditor, had seized goods not belonging to the debtor, but pointed out by the creditor as the debtor's goods, might recover from the creditor indemnity for the damages and costs of an action in which the real owner recovered against the sheriff. If an act be indifferent in itself, and become lawful or unlawful only from the circumstances attending it, then the party who orders it to be done may be made answerable for its consequences to the party acting upon the order. In *Fletcher v. Harcot* (4) the plaintiff declared that the defendant had arrested one B. on a commission of rebellion, and had requested the plaintiff to keep him as prisoner, and had promised to indemnify; that the plaintiff had kept him, and that B. had afterwards recovered against the plaintiff for false imprisonment; the jury found for the plaintiff on an issue of *non assumpsit*; and, on motion in arrest, the plaintiff had judgment, the COURT saying, that he which doth a thing which

(1) 29 R. R. 503 (4 Bing. 66).

154; 2 Dow & Cl. 288).

(2) 40 R. R. 493 (1 Cr. M. & R. 73;
4 Tyrwh. 677).

(4) Hutton, 55. S. C. as *Battersey's*
case, Winch, 48.

(3) 35 R. R. 41 (5 Bligh (N. S.)

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may be lawful, and the illegality thereof appear not to him, he which employs the party and assumes to save him harmless, shall be charged. In *Farebrother v. Ansley* (1) it was held that the sheriff is not bound by implied promise to indemnify an auctioneer, who has, at the request of the sheriff's officer, sold goods belonging to a stranger who recovers against him; and *that, if the sheriff be made by such party a joint defendant with the auctioneer, the latter, in the event of execution being levied upon him alone, cannot come upon the sheriff for contribution. The ground of that decision was, that the officers were liable to the sheriff, not the sheriff to the officers, who had involved him in the trespass. In a note to the case, *Fletcher v. Harcot* (2) is cited; and the reporter adds, that he has not been able to find any case deciding how far a promise of indemnity will be implied, where one ignorantly commits a trespass at the request of another. *Martyn v. Blithman* (3) is cited in the same note; the effect of that case is, that an express promise to indemnify a party against the consequences of an act known by that party to be illegal, will not be a ground of action. Whether the promise in *Fletcher v. Harcot* (2) was express or implied does not appear.

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Again, the plaintiffs are not fixed with the knowledge that the right of stoppage *in transitu* was determined, even if it was determined. The only facts within their knowledge were, the arrival at the wharf, the order given by the defendant to separate the goods for the parties and to have them taken away, and the delivery of the two casks. In *Hanson v. Meyer* (4) it was held that a weighing by a warehouse keeper, by the order of the owner, of a part of an article sold in the mass, for the purpose of delivery, and a delivery of that part, did not amount to a delivery of the whole, although the order of the vendor to the warehouse keeper was, to weigh and deliver the whole: *Winks v. Hassall* (5), *Dixon v. Yates* (6), and *Miles v. Gorton* (7), are authorities to shew that the partial delivery does not entitle the

[*68]

(1) 1 Camp. 343.

(5) 9 B. & C. 372.

(2) Hutton, 55. S. C. as *Battersey's* case, Winch, 48.

(6) 39 R. R. 489 (5 B. & Ad. 313).

(3) Yelv. 197.

(7) 39 R. R. 820 (2 Cr. & M. 504; 4 Tyr. 295).

(4) 8 R. R. 572 (6 East, 614).

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assignees in this case to maintain trover. *New v. Swain* (1) shews that the casks, while lying at the wharf, were not to be considered as in the possession of the assignees. The order of October the 9th, 1890, was revocable: *Gibson v. Minet* (2). At any rate, the defendant, by giving the order of November the 2nd, 1890, to the plaintiffs, undertook to them, that he was still owner of the goods; and he has affirmed their act by taking the proceeds from another party, and allowing the goods to remain in the hands of Moline.

Waddington, for the defendant:

If the letters objected to be held admissible, it will be on the ground that the Court and jury ought to have known the position of all the parties, for the purpose of seeing how the question of stoppage *in transitu* stood. But, independently of these letters, the facts shew fully that the plaintiffs knew the right of the stoppage *in transitu* to have been determined. The general rule is that, where an entire quantity of goods is sent to a wharfinger under a single contract, to be delivered to the vendee, there the delivery of part determines the right of stoppage: *Slubey v. Heyward* (3), *Hammond v. Anderson* (4). And this principle was recognised in *Crawshay v. Eades* (5), as not admitting of argument; though in the particular case, the decision turned upon *the delivery of part not having taken place in fact. Now the plaintiffs here were cognisant of such a delivery. Two casks were taken by Nyren and Wilson, from the custody of the plaintiffs, about the 20th of October, 1890; and these were a part of the whole quantity which the order of October the 9th, 1890, had directed the plaintiffs to set apart for Nyren and Wilson. Besides, the language of the plaintiffs in their notices of the 3rd of November and 10th of November, 1891, shewed that they knew there was no right of stoppage. Assuming, then, the fact of this knowledge, two questions arise. The first is, whether, under the circumstances, a promise by the defendant

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(1) 34 R. R. 767 (1 Dan. & Lloyd, (N. R.) 69).
193).

(5) 25 R. R. 348 (1 B. & C. 181).

(2) Ry. & M. 68.

See the judgments of BAYLEY, J.
and BEST, J., 25 R. R. pp. 350, 351.

(3) 3 R. R. 486 (2 H. Bl. 504).

(4) 8 R. R. 763 (1 Bos. & P.

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to indemnify the plaintiffs can be implied; if it can, it is not disputed by the defendant, that such a promise will have the same legal effect as an express one. The second question is, whether an express promise, in this case, would support an action.

First, it has never been decided that a promise to indemnify will be implied where there has not been either a mistake as to facts, or a misrepresentation by the party charged. In *Fletcher v. Harcot* (1) the question arose after verdict, at which stage the fact of the promise could not be disputed. The question in *Adamson v. Jarvis* (2) also arose after verdict. Many of the remarks made in the judgment in that case were unnecessary to the decision. And the passage cited (3) with approbation from Lord KENYON's judgment in *Merryweather v. Nixan* (4), that the decision there "would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the *purpose of asserting a right," is rather in favour of the defendant, than against him; for here the plaintiffs, as has been shewn, knew that they were detaining what another person had a right to have. The true principle of the decision of *Adamson v. Jarvis* occurs in a later part of the judgment (5), "that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action." So in *Humphrys v. Pratt* (6) there was a distinct assertion of a particular fact. Now, in the present case, there was nothing like a false assertion on the part of the defendant. The notion of implying such a promise seems to have been first raised in *Farebrother v. Ansley* (7); and there Lord ELLENBOROUGH, in the earlier stage of the case, says that there can be no contribution among joint wrongdoers; the wrong-doing there was only an employment of an auctioneer, by the sheriff, to sell goods; and the "trespass" (which is the expression used by Lord ELLENBOROUGH) was merely a conversion; and he said that, even

(1) *Hutton*, 55. *S. C.* as *Battersey's* case, *Winch*, 48.

(2) 29 R. R. 503 (4 Bing. 66).

(3) 29 R. R. 508 (4 Bing. 72).

(4) 16 R. R. 810 (8 T. R. 186).

(5) 29 R. R. 509 (4 Bing. 73).

(6) 35 R. R. 41 (5 Bligh (N. S.) 154; 2 Dow & Cl. 288).

(7) 1 Camp. 343.

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supposing that the plaintiff had been employed by the defendants, it did not follow that they were bound to indemnify him. In *Wilson v. Milner* (1) a sheriff had seized goods in execution, for which the assignees of the defendant sued him in trover and recovered, and he then sued the execution creditor; but Lord ELLENBOROUGH said, that among joint tort-feazors there was neither contribution nor implied promise of indemnity, and the plaintiff failed as to that part of his demand, though, at the same time, he was allowed to recover the *fruits of the levy, which he had paid to the execution creditor under a mistake as to facts, as money had and received. In *Langdon v. African Company* (2) a person in the service of the company had seized a ship, which was condemned for prize, and the cargo was accounted for to the company; but afterwards a freighter recovered a judgment against that person's executor; and the company was decreed in equity to indemnify the executor, though he was not allowed relief in equity against the freighter, because he might have defended himself at law (3); from which it may be inferred that the executor could not have recovered at law against the company.

Secondly, even if there were an express promise, the Court would not allow the plaintiff to recover on it, for no express promise in consideration that another will commit a breach of duty is good in law: Selwyn's N. P. Assumpsit I. (4) and note to *Barber v. Fox* (5). Now the dealing with the goods otherwise than the plaintiffs were bound to deal with them, is a breach of duty, *Streeter v. Horlock* (6), where the Court said (7), "Whenever, as in this case, an order is given previously to the delivery of goods to a carrier or other bailee, to deal with them, when delivered, in a particular manner, to which he assents, and afterwards the goods are delivered to him accordingly, a duty arises on his part, upon the receipt by him of the goods, to deal with them according to the order previously given and assented to." It may be said here, that the order given *by the defendant to the plaintiffs was revoked; and it is true that, as

(1) 2 Camp. 452.

(2) Prec. Chan. 221, cited in Vin. Abr. Master and Servant (G.) pl. 5.

(3) This reason is assigned in the marginal note; but it does not appear

expressly in the body of the report.

(4) P. 61 (8th edit. 1831).

(5) 2 Wms. Saund, 137 e, n. (b).

(6) 25 R. R. 579 (1 Bing. 34).

(7) 25 R. R. 580 (1 Bing. 36).

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between the vendor and his wharfinger, the former may absolve the latter from his duty, but he cannot relieve him from the duty to the vendee, previously cast upon him. It is to be observed, too, that the consideration laid is, not merely that the plaintiffs would deliver the goods to a third person, but that they would not deliver them to Nyren and Wilson. In *Pitcher v. Bailey* (1) the principle here contended for on the part of the defendant was acted upon, although there was an express promise. A banker is bound to pay a cheque which his customer, having funds at his bank, gives to a third person: *Marzetti v. Williams* (2). Now, supposing a person were to go to the banker and promise to indemnify him for not paying the cheque, could an action be supported on such promise?

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(TAUNTON, J.: That might or might not be a breach of duty.

LORD DENMAN, Ch. J.: Suppose, in the case you put, there were a doubt whether the banker was bound to pay to the particular customer.

PATTESON, J.: You put the case of a mere stranger promising to indemnify; that is very unlike the present case.)

There does not appear to have been, in the present case, any dispute as to the right, nor any misrepresentation as to facts.

Lastly, even if there be a legal promise to indemnify, it has been complied with, and the transaction is closed; for the defendant, in the letter of the 17th of November, 1831, offers to put eight casks into the hands of the plaintiffs, which the latter accept, and endeavour to make their bargain with the assignees; and, after the assignees have declined to accept the casks, the plaintiffs do not again communicate with the defendant till the 21st of January, 1832, at which time the defendant was entitled to consider the transaction closed.

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Chilton, in reply:

It does not appear that the plaintiffs lost any time in communicating to the defendant the refusal of the assignees to accept

(1) 8 East, 171.

(2) 35 R. R. 329 (1 B. & Ad. 415).

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the eight casks ; the assignees were probably deliberating in the intermediate time. In *Wilson v. Milner* (1) the creditor does not appear to have directed the sheriff to seize the specific goods, but only the debtor's goods ; here there is an express order to detain the goods in question. Even if a request would not imply a promise to indemnify, an order, which was given in the present case, must do so. As to the delivery, a delivery of part amounts to a delivery of all, only where there are circumstances to shew that it is meant as such.

(TAUNTON, J. : No ; on the contrary, a partial delivery is a delivery of the whole, unless circumstances shew that it is not so meant.)

LORD DENMAN, Ch. J. :

It is quite unnecessary to inquire whether there was a good defence to the action brought by Nyren and Wilson : perhaps that inquiry might not be advantageous to the plaintiffs ; for, if there was a defence, it may be said that the plaintiffs ought to have made it. However, supposing there was a *bonâ fide* doubt, the plaintiffs had a right to act upon the instructions of the defendant, and detain the goods, and may come upon him for the consequences of their so doing. Taking this as a question of fact, I have no doubt that a jury at Guildhall would have said that the *parties understood that there was an engagement to indemnify. On the 2nd of November, 1830, the brother of the defendant, by his authority, personally gave directions to the plaintiffs not to deliver the goods to Nyren and Wilson ; and, on the same day, the plaintiffs received from the same authority a signed order to deliver to Elliott. If the jury had been asked, as commercial men, whether an indemnity was implied, they must have said that it was. Or, supposing the question to rest on the implication of law, why should not the law say that such an order carries an indemnity with it, if the act be not criminal ? The case of *Merryweather v. Nixan* (2) seems to me to have been strained beyond what the decision will bear. The present case is an exception to the general rule. The general rule is, that

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(1) 2 Camp. 452.

(2) 16 R. R. 810 (8 T. R. 186).

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between wrongdoers there is neither indemnity nor contribution : the exception is, where the act is not clearly illegal in itself. And *Merryweather v. Nixan* (1) was, besides, only a refusal of a rule *nisi*. I do not see the distinction between contribution and indemnity ; but it appears to me that there is nothing to prevent either in this case. It was perfectly competent to the defendant to say, "I claim the goods ; do you keep them for me : " and the plaintiffs were not bound to exercise their judgment on this claim, though they were acquainted with all the facts. If they were acting *bonâ fide*, I cannot conceive what rule there can be to hinder the defendant from being liable for the risk. In *Farebrother v. Ansley* (2) Lord ELLENBOROUGH seems merely to have spoken of the general rule in *Merryweather v. Nixan* (1), without referring to the exceptions. In *Wilson v. Milner* (3) *he certainly did go to the point. That, however, is only a *nisi prius* decision ; and if the effect of it was, that, wherever it turns out that the parties are wrong, there can be no indemnity, I think the decision is not sustainable. In *Adamson v. Jarvis* (4) we have the observations of a learned person, familiar with commercial law. He says (5) " Auctioneers, brokers, factors, and agents, do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrongdoers, and could not recover compensation from him who had induced them to do the wrong." *Fletcher v. Harcot* (6) shews that there may be an indemnity between wrongdoers, unless it appears that they have been jointly concerned in doing what the party complaining knew to be illegal. The act there done was a very strong one ; yet, though it turned out to be entirely wrong, the indemnity was allowed. Now, whether the promise there was express or implied, it would have equally been void if against public policy. That case seems to me to go to this full extent ; that where one party induces another to do an act which is not legally sup-

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(1) 16 R. R. 810 (8 T. R. 186).

(2) 1 Camp. p. 345.

(3) 2 Camp. 452.

(4) 29 R. R. 503 (4 Bing. 66).

(5) 29 R. R. 508 (4 Bing. 72).

(6) Hutton, 55. *S. C. as Battersey's* case, Winch, 48.

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portable, and yet is not clearly in itself a breach of law, the party so inducing shall be answerable to the other for the consequences.

TAUNTON, J. :

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I am of the same opinion. The principle laid down in *Merryweather v. Nixan* (1) is too *plain to be mistaken ; the law will not imply an indemnity between wrongdoers. But the case is altered when the matter is indifferent in itself, and when it turns upon circumstances, whether the act be wrong or not. The act done here, by changing the destination of the goods at the order of the defendant, was not clearly illegal, and, therefore, was not within the rule of *Merryweather v. Nixan* (1).

PATTESON, J. :

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I am clearly of opinion, on the facts of this particular case, that the plaintiffs are entitled to recover. The objection to the reception of the letters is not much pressed ; and, indeed, that question is quite immaterial, since the original order from Nyren and Wilson must have been received by the defendant, and that is the only part of the correspondence which is to the point now before us. The principal question is, whether the defendant undertook to indemnify the plaintiffs. No express undertaking is found ; but I think that, if the facts had been put to the jury, they would have found such a contract. There could not be a plainer case of a command not to deliver than appears from what took place on the 2nd of November, 1830. Then it is said that both are wrongdoers, but I think that is not so. Whether there was a right of stoppage *in transitu*, it is not material to determine. It is enough if there was any doubt. And surely the acquiescence of the plaintiffs in the order of the defendant to stop the casks would have been enough to support an express promise. The parties were not plainly wrongdoers, in the sense in which that word is *used in the cases referred to for the defendant. This was a claim which might possibly be resisted ; and an implied promise to indemnify may be inferred from the plaintiffs' consenting to resist. As to the supposed waiver on the part of the plaintiffs, the facts will not bear out the supposition ;

the eight casks, spoken of in the letter of the 17th of November, 1831, were not sent to the plaintiffs by way of indemnity, but in the hope that Nyren and Wilson might be persuaded to accept them.

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WILLIAMS, J. :

I am of the same opinion. This case bears no analogy to those in which an indemnity is claimed for acts obviously unlawful, like breaches of the peace, nor to cases in which the conduct of the parties is in contravention of public policy. It is a mere interference with a particular contract. The defendant requests the plaintiffs to do an act which is at the time equivocal, as we may fairly infer from the arguments we have heard on the subject; at any rate, it was so far doubtful, that it could not be notoriously illegal. Then the defendant gives a written order, changing the destination of the goods, which are thereupon delivered in pursuance of that order. Here there is nothing clearly illegal: the plaintiffs acted in obedience to the defendant's orders, as it was perfectly open to them to do; and the defendant is therefore liable for the consequences of those orders.

Judgment for the plaintiffs.

CHESTERMAN v. LAMB.

(2 Adol. & Ellis, 129—133; S. C. 4 N. & M. 195.)

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Nov. 13.

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If the purchaser of a horse on warranty discovers him to be unsound, he should immediately tender him back to the seller; and, if the seller refuse to take him, should sell him as soon as possible, for the best price that can be procured. The seller is liable for his keep, in the meanwhile, for a reasonable length of time.

What length of time is reasonable, in any particular case, is a question for a jury.

In an action upon such a warranty, if defendant wishes to reduce plaintiff's claim for keep on the ground that the time was unreasonable, he must make that point at the trial. If he then defends solely on the ground that there was no breach of warranty, and the jury give damages in respect both of the price and keep, he cannot move to reduce them because the Judge did not leave it to the jury whether or not the horse was kept an unreasonable time.

ASSUMPSIT on the warranty of a horse; the declaration alleging, in one count, that the plaintiff was put to expense

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in keeping the horse. Plea, the general issue. *On the trial before Taunton, J. at the Middlesex sittings in last Easter Term, the material facts appeared to be as follows: The defendant sold and delivered the horse to the plaintiff on the 28th of June. Early in July the horse was found to be lame; on the 10th, upon examination by a veterinary surgeon, the complaint was found to be spavin. On the 11th of July the plaintiff gave the defendant notice that the horse was unsound, and that he should return him and demand back the purchase-money: and on the 26th the plaintiff sent the horse to livery, and informed the defendant that he had done so. On the 27th this action was commenced; and on the 16th of September the plaintiff (having informed the defendant of his intention so to do) sold the horse by auction for 23 guineas. The action was brought to recover the difference between that sum and 40*l.*, the price given by the plaintiff, and likewise 9*l.* 17*s.* for the horse's keep at livery till the second sale. For the defendant, it was insisted that the horse was not unsound, and, consequently, that nothing was due, on account either of the price or of the keep. The learned Judge, in leaving the case to the jury, said, that in his opinion there had been a sufficient tender of the horse back to the defendant; that if the horse was unsound, it was the defendant's duty to provide for the charges of standing at livery; and therefore the plaintiff, in that case, would be entitled to the 9*l.* 17*s.* claimed for keep. The jury found a verdict for the plaintiff, for the whole sum demanded. *Platt*, in the same Term, moved for a rule to shew cause why there should not be a new trial, or why the verdict should not be reduced in respect of the keep; contending that, if the plaintiff was entitled to recover any thing on that head, still the learned *Judge ought to have directed the jury to allow keep during such time only as was absolutely necessary for selling the horse; and he cited *Caswell v. Coare* (1). A rule *nisi* having been granted,

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Byles now shewed cause:

The plaintiff was, at any rate, entitled to recover for some keep; that is, during such time as was requisite to enable him

(1) 10 R. R. 606 (1 Taunt. 366).

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to sell the horse to the best advantage: *M'Kenzie v. Hancock* (1). Whether he kept the horse longer than was necessary for that purpose, was a question for the jury; and the evidence here shewed that the horse was not kept for an unreasonable time; or, at least, that there was no undue detention by the fault of the plaintiff. Besides, if the defendant meant to rely on this defence, he should have urged it at the trial; but his case there was, that no keep at all was recoverable.

Platt, contra :

The measure of damage is, how much less the horse was worth than the price given, after he had been a reasonable time in the hands of the purchaser. And the expense of keep can only be reckoned for the same reasonable time. The extent of the plaintiff's right to recover in respect of keep, was a point which, at all events, the learned Judge ought to have stated to the jury.

(TAUNTON, J. : The defendant's case was that the horse was not lame at all: the objection that he had been kept too long, was never suggested. I did not, in summing up, look to the right or left, to see what point might be raised independently of that relied upon.)

The defence being *that there was no unsoundness, it could not consistently have been urged to the jury that the plaintiff was too late in returning the horse; but the Judge should have called their attention to that point, which, indeed, was a point of law. It appears from *Caswell v. Coare* (2) that, when the warranty is broken, the plaintiff may instantly sell the horse for what he can get, and may recover the residue of the price in damages: there the whole amount of keep was deducted from the sum given by the jury.

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(WILLIAMS, J. : At least some time must be allowed for discovering what the cause of the defect is.)

(1) 27 R. B. 769 (By. & M. 436). (2) 10 R. B. 606 (1 Taunt. 566).

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LORD DENMAN, Ch. J. :

I can conceive no case where a purchaser returns a horse, in which the seller may not be liable for some keep. The law upon the subject is thus laid down in Mr. Selwyn's Law of Nisi Prius, 8th ed. vol. i. p. 657, tit. Deceit I. 2: "As soon as the unsoundness is discovered, the buyer should immediately tender the horse to the seller; and, if he refuses to take him back, sell the horse as soon as possible for the best price that can be procured; for the purchaser is entitled to recover for the keep of the horse for such time only as would be required to resell the horse to the best advantage" (1). Whether the time of keeping be reasonable or not, is a question for the jury. But here the defendant altogether denied his liability. It is true that counsel would have been under a disadvantage in resting the case on two different grounds; but that consideration cannot vary the course which *must be pursued in trying a cause. If the defendant's counsel meant to rely upon the unreasonableness of the time, he should have shewn grounds for insisting on that point, and taken the opinion of the jury upon it. It was sufficient for the Judge to take the defendant's case up as his counsel presented it. I think the rule ought not to be made absolute.

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TAUNTON, J. concurred.

PATTESON, J. :

The defendant's counsel should either have put the point to the jury himself, or requested the learned Judge to do so in summing up.

WILLIAMS, J. :

I am of the same opinion; and, all things considered, I think the defendant is well off.

Rule discharged.

(1) Citing *M'Kenzie v. Hancock*, 27 R. R. 769 (By. & M. 436).

BROWN v. SHEVILL.

(2 Adol. & Ellis, 138—146; S. C. 4 N. & M. 277; 4 L. J. (N. S.) K. B. 50.)

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A butcher sent a beast to the shop of W., another butcher, to be slaughtered: after it had been slaughtered, and the carcass had remained in the shop for some time (but how long did not appear), W.'s landlord distrained it for rent arrear: Held, that the carcass was privileged from distress.

TRESPASS. The first count of the declaration stated, that the defendant seized, took, and distrained certain bullocks' carcasses and meat, the property of the plaintiff, and sold them as a distress, whereby the plaintiff, being a butcher, and exercising that trade, was prevented from supplying his customers with the regular quantity of meat, and was obliged to purchase other carcasses, at a high rate, for his customers. The second and third counts were for seizing and converting the articles, without stating the plaintiff's trade. Plea, not guilty. On the trial before Denman, Ch. J., at the December sittings at Guildhall, 1833, the plaintiff's case was, that the plaintiff had sent a bullock to the premises of one Woodham, a butcher, to be slaughtered there by Woodham; and that, after it had been so slaughtered, it was seized by the defendant as a distress for rent owing for the premises by Woodham. The LORD CHIEF JUSTICE told the jury that, if they believed these facts, and that the plaintiff was the real owner, and not merely substituted to evade the distress, they should give a verdict for the plaintiff. The jury found for the plaintiff. In Hilary Term last, **Hutchinson* obtained a rule to shew cause why the verdict should not be set aside, and a new trial had.

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F. Pollock now shewed cause:

After verdict, it cannot be said that the plaintiff was not the real owner: and this raises the question, whether goods under these circumstances be not protected from distress. The judgment in *Simpson v. Harcourt*, cited in *Gorton v. Falkner* (1), though it confined the privilege of implements of trade from distress, to cases where there is no other sufficient distress to be found, and to such implements as are in actual use at the time

(1) 2 R. R. 466 (4 T. R. 568, n. S. C. more fully, Willes, 512).

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of the distress, or cannot be restored in the same plight, yet admitted the absolute privilege of things delivered to persons exercising their trade, as cloth in a tailor's shop.

(He was then stopped by the Court.)

Massy Dawson, contra :

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In *Gorton v. Falkner* (1), ASHHURST, J. lays it down as a general principle, that all chattels found in a person's house are liable to be distrained by the landlord, adding, that "the foundation of this principle is, that as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to every thing which he finds there." The exceptions to this rule are reducible to the principle cited by DALLAS, Ch. J., in *Gilman v. Elton* (2), from *Gisbourn v. Hurst* (3), that "goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are, for that time, under a legal protection, and privileged from distress for rent." The same principle *has since been recognised in *Wood v. Clarke* (4), and *Adams v. Grane* (5). In order to bring the present case within the principle of the exceptions, three circumstances must therefore concur: the trade must be public; taking in the cattle of others to slaughter, must be essential to it; and it must appear that, in point of fact, Woodham, here, did so take in the bullock. Now, first, the trade of a butcher is not public, in the sense of the words which the rule requires. The trade of an auctioneer, for instance (the trade held in *Adams v. Grane* (5) to be within the exception), is public upon grounds not applicable to the trade of a butcher; and the same made be said of all the other trades which have been held to be public. Secondly, it is not essential to the trade, or to public convenience, that a butcher should slaughter cattle which are the property of other butchers. The plaintiff appears, by the declaration, to be himself a butcher.

(1) 2 R. B. 466 (4 T. R. 568, n. S. C. more fully, Willes, 512).

(2) 23 R. R. 567 (3 Brod. & B. 80).

(3) 1 Salk. 250.

(4) 35 R. R. 758 (1 Cr. & J. 484; 1 Tyr. 314).

(5) 38 R. R. 624 (1 Cr. & M. 380; 3 Tyr. 326).

The instances mentioned by DALLAS, Ch. J. in *Gilman v. Elton* (1), from the judgment of WILLES, Ch. J. in *Simpson v. Hartopp* (2), are, materials sent to a weaver, or cloth to a tailor; and the reason there suggested for the protection of those articles is, that trade and commerce could not otherwise be carried on. So Blackstone (3), "Valuable things in the way of trade shall not be liable to distress. As a horse standing in a smith's shop to be shod, or in a common inn; or cloth at a taylor's house; or corn sent to a mill, or a market. For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not *to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distreinable by him for rent: for otherwise a door would be open to infinite frauds upon the landlord." This passage is cited, and the doctrine apparently adopted, in Lord LYNCHURST's judgment in *Wood v. Clarke* (4). In all these instances (to which might be added others, as that of an auctioneer), the general principle is, that the convenience of the trade, as it affects the public, is to be looked to. But it is not essential to the trade, as it affects the public, that one butcher should send cattle to be slaughtered by another; and, in fact, this is not the common way of conducting the trade; and the landlord could not presume that the carcass did not belong to the tenant. Thirdly, it did not appear in evidence that this carcass was actually in the shop in the ordinary course of trade. It was for the plaintiff to shew that the facts raised an exception to the general rule. In 1 Starkie on Evidence, p. 365 (5), it is said, "In general, where it has been shewn that the case falls within the scope of any general principle or rule of law, or the provision of any statute, whether remedial or even penal, it then lies on the opposite party to shew by evidence that the case falls within an exception or proviso." To bring the present case within the exception,

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(1) 23 R. R. 567 (3 Brod. & B. 80).

(2) Willes, 515.

(3) 3 Bl. Comm. book 3, ch. i. p. 8.

(4) 35 R. R. 758, 761 (1 Cr. & J. 484, 497; 1 Tyr. 327, 328).

(5) 2nd edit. 1833.

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the plaintiff was at least bound to shew that the carcass had not remained at the shop an unreasonable time; otherwise it could not be said to be there in the ordinary course of trade. Thus, in *Adams v. Grane* (1), BAYLEY, J. makes the following *remark on the case of *Francis v. Wyatt* (2) (in which case it was held that a carriage standing at livery was not protected): "If I am not mistaken, one ground of that decision was that the carriage was staying there for a permanency, and so occupying the premises for which the rent was payable." *Francis v. Wyatt* (2) is therefore an authority in favour of the defendant. All that appeared in the present case was that the carcass was at the shop, like other articles on sale.

LORD DENMAN, Ch. J.:

The first question is one of facts; that is, whether the plaintiff was owner, and whether he had sent the beast to Woodham that it might be slaughtered? and the jury have found both these facts in the affirmative. The second question is, whether, upon these facts, the carcass was protected from distress? I think it was. For the general protection of trade, goods which are put into a person's hands, in order that he may exercise his trade upon them, are protected. Instances of this may be found in Comyns's Digest (3); and the rule is laid down in *Gisbourn v. Hurst* (4). The counsel for the defendant has made some observations upon the word "public," which occurs in the last mentioned case. But we must not insist upon this word so strictly as to hold that it comprehends only such trades as are commonly called public, like those of an innkeeper or a weaver. The last case mentioned by the Court in *Gisbourn v. Hurst* (4), is that of two tradesmen, who brought their wool to a neighbour's beam, which he kept for his private use; and it was held *that it could not be distrained (5). Then it is said that the Court of Exchequer has explained this privilege, and that it exists only where the common presumption is, that the goods belong, not

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(1) 38 R. R. 625 (1 Cr. & M. 381;
3 Tyr. 328).

(2) 3 Burr. 1498. S. C. 1 Sir W.
Bl. 483.

(3) Distress (C).

(4) 1 Salk. 250.

(5) *Read v. Burley*, Cro. Eliz. 549,
596. S. C. Noy's Rep. 68.

to the owner of the house, but to his customers (1). There was, however, in the case alluded to, no more than a mere citation by Lord LYNDHURST of some authorities, in which it was said that the goods sent in the course of trade would be supposed, in common presumption, to belong to the customer; and the decision of that case does not turn upon the doctrine in question. In *Wood v. Clarke* (2), the general privilege of materials delivered to a weaver by a manufacturer was admitted; which is a case much like the present; and that principle is in strict conformity with *Simpson v. Harcourt* (3), and with the case in the Common Pleas (4). If cloth sent to a tailor to be made into clothes, and materials sent to a weaver to be made into cloth, are protected, I think the carcass of a beast, which has been sent to a butcher's to be slaughtered, is protected also: I cannot distinguish such a case from the others.

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TAUNTON, J.:

I am entirely of the same opinion. The cases collected in Com. Dig. Distress (C), are abundantly sufficient to illustrate the principle; and many instances there given seem, in my judgment, to carry the protection farther than is required for the present case. The case of *Gisbourn v. Hurst* (5) is *much stronger than the present. There a carrier brought his waggon with cheese, which had been delivered to him to carry, into a barn, where it remained two nights and a day; and the house to which the barn belonged was not an inn, but a private house; and it was held that the goods could not be distrained. The Court there agreed "that goods belonging to any person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent." And the carrier was held to be, for the purposes of the privilege, a common carrier, though that was not his regular employment, on the ground that he took goods of all persons

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(1) See judgment in *Wood v. Clarke*, 35 R. R. 761 (1 Cr. & J. 497; 1 Tyr. 327, 328). (3) Willes, 512, cited in *Gorton v. Falkner*, 2 R. R. 466 (4 T. R. 568, n.).

(2) 35 R. R. 758 (1 Cr. & J. 484; 1 Tyr. 314). (4) *Gilman v. Elton*, 23 R. R. 567 (3 Brod. & B. 75).

(5) 1 Salk. 249.

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indifferently for hire. But then it is said that the trade of a butcher is not a public one. I know none more public, or the carrying on of which is more convenient or necessary: it is as much so as a trade in corn. It is also said that the article, in this case, was not brought to be wrought or managed in the way of the trade. But the beast was taken to a butcher's to be slaughtered; and a butcher's business is to slaughter beasts, as well as to cut them up and sell them to the public. In *Read v. Burley* (1) the beam was kept for the tenant's private use. In *Thompson v. Mashiter* (2) goods deposited by a factor at a wharf were held to be protected. The law by which we decide this case is no new law; it is as old as the time of Queen Elizabeth, and has been acted upon in various instances, subject to no exception applicable here.

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PATTESON, J. :

I also am of opinion that the carcass was protected from distress, on the general ground that it was in the hands of Woodham, in the way of his trade. I cannot distinguish this case from that of a tailor; for though the trade of a tailor was originally confined to the cutting up of cloth for others, yet, as it is now carried on, it is not necessary that he should be trusted with cloth which is not his own. Yet cloth of a third person, in the hands of a tailor, for the purpose of being cut up, is not now distrainable. Reliance seems to be placed on the case of *Francis v. Wyatt* (3). There it was held, that a carriage standing at livery was not protected. The judgment in that case is not formally reported: Lord MANSFIELD, in the first instance, advised the avowant to consider, whether it was for his advantage that judgment should be finally given in his favour; and afterwards it seems to have been given up by the plaintiff, the Court being clearly against him: so that we are not aware of the reasons for the judgment (4).

(1) Cro. Eliz. 549, 596.

(2) 25 R. R. 624 (1 Bing. 283).

(3) 3 Burr. 1498; 1 Sir W. Bl. 483.

(4) In Sir W. Blackstone's Report (p. 485), it is said, that judgment was given "on the ground of its

being part of the profits of the premises; which distinguishes it from the case of goods sent to be manufactured." See the ground assigned by Lord KENYON in *Gorton v. Fulkner*, 2 R. R. 466 (4 T. R. 567).

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There is, however, this distinction between that case and the present; that there the carriage was placed in the tenant's hands merely for custody, and nothing was to be done to it, whereas, here, the beast was sent to be slaughtered. Then a question is made, whether the trade of a butcher be a public one. What is meant by *public* I do not understand. A common carrier and an innkeeper are bound to take in goods sent to them for the purposes of their trade. If that be the distinction *pointed at, I can understand it; and it was insisted upon in the argument for the avowant in *Francis v. Wyatt* (1). But a tailor is not obliged to take in cloth to be cut by him. I find, indeed, that an old authority was cited to shew that he is (2); but that seems to have been afterwards repudiated: so that I do not see how we can make such a distinction available for the purpose of the present question. The jury have here found the fact, that the beast belonged to the plaintiff, and was sent to Woodham to be slaughtered.

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WILLIAMS, J.:

I am of the same opinion. The article in question was deposited in the course of trade. Many proprietors of cattle have no place upon the premises where cattle can be slaughtered. The protection of the carcass, therefore, in a case like this, is for the benefit of trade, just as much as that of any article in the trades where the protection is admitted to exist. Allusion has been made to the necessity of the trade being public: by which is meant, I presume, that the nature of the case ought to be such that the landlord has not reason to suppose the goods to belong to his tenants more than to the tenants' customers. But in the case in the Exchequer (3), which has been relied upon for this distinction, the case of a beam kept

(1) 3 Burr. 1499, 1501; 1 Sir W. C. P. *arg.*). See the argument in *Adams v. Grane*, 38 R. R. 624 (1 Bl. 484.

(2) In the argument for the avowant in *Francis v. Wyatt* (3 Burr. 1499), counsel cited the Year Book of Hil. 22 Edw. IV. 49, pl. 15, to judgment of VAUGHAN, B.

(3) See judgment in *Wood v. Clarke*, 35 R. R. 758 (1 Cr. & J. 497; that effect (per BRIAN, Ch. J. of 1 Tyr. 327, 328).

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for private use was cited (1), to which the distinction will not apply.

Rule discharged.

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DOE D. WETHERELL v. BIRD.

(2 Adol. & Ellis, 161—166; S. C. 4 N. & M. 285; 4 L. J. (N. S.) K. B. 52; at N. P. 6 C. & P. 195.)

In a lease of a house (made in 1802) there was a covenant, with a clause of forfeiture, not to use or exercise the trades or businesses of a butcher, baker, slaughterman, melter of tallow, tallow chandler, tobacco pipe maker, tobacco pipe burner, soap maker, sugar baker, fellmonger, dyer, distiller, victualler, vintner, tavern-keeper or coffee house keeper, tanner, common brewer, or any offensive trade, without licence: Held, that the lease was not forfeited by carrying on any occupation besides a trade, and that it was not a trade to use the house as a private lunatic asylum; the word trade in this covenant being applicable only to a business conducted by buying and selling.

EJECTMENT for a house, &c., in Middlesex. On the trial before Denman, Ch. J., at the Middlesex sittings in December, 1833, it appeared that the action was brought upon a forfeiture of a lease, granted in 1802 by the father of the lessor of the plaintiff to a person of the name of Soilleaux, who assigned to the defendant. The lease contained a power of re-entry upon breach of any of the covenants; and there were covenants (amongst others) to repair and uphold the buildings, brick walls, &c., "and further, that the said J. N. J. Soilleaux, his executors, administrators, and assigns, shall not nor will, at any time during the said term hereby granted, permit or suffer any person or persons whomsoever to inhabit or dwell in or upon any part of the said hereby demised premises, who shall use or exercise therein or thereupon the trades or businesses *of a butcher, baker, slaughterman, melter of tallow, tallow chandler, tobacco-pipe maker, tobacco-pipe burner, soap maker, sugar baker, fellmonger, dyer, distiller, victualler, vintner, tavern keeper or coffee-house keeper, tanner, common brewer, or any offensive trade, without the special licence and consent of the said Thomas Wetherell, his heirs and assigns, in writing, first had and obtained for that purpose." The breaches insisted upon were two; first, that a wall had been taken down; and,

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(1) *Read v. Burley*, Cro. Eliz. 549, 596; Noy's Rep. 68.

secondly, that a person who held under the defendant had used the house as a private lunatic asylum. The defence as to the first breach turned entirely upon facts: with respect to the second breach, evidence was given on both sides as to the degree of annoyance, if any, created by the use of the house for the purpose mentioned. The LORD CHIEF JUSTICE told the jury that he was of opinion that the manner in which the house was used came within the word "trade" in the covenant, and he left it to them whether it was offensive, asking, whether or not they would choose to live near a house so occupied. The jury found a verdict for the plaintiff, stating that they did so with respect both to the wall, and to the offensiveness of the trade. In Hilary Term last, *Sir James Scarlett* obtained a rule *nisi* for a new trial, on the grounds, as to the first breach, of surprise, and of the verdict being contrary to evidence; and, as to the second breach, of misdirection.

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Sir John Campbell, Attorney-General, *F. Pollock*, and *Kelly* now shewed cause (1):

This is an offensive trade, within the meaning of the covenant. It is not a *fair criterion, whether or not it would be a trade within the bankrupt laws; several of the trades before specified in the covenant are not so now, and others were not so as the bankrupt laws stood at the time of the lease, 1802. And the bankrupt laws were passed *alio intuitu*. The word "trade" is used here in the popular sense, as Shakspeare calls the gathering samphire on the face of Dover cliffs a "dreadful trade." In Johnson's Dictionary, among the definitions of "trade," is "occupation; particular employment, whether manual or mercantile, distinguished from the liberal arts or learned professions," and again, "any employment not manual." A fisherman does not get his livelihood by buying and selling, yet it would scarcely be disputed that he would come under this covenant, if he carried on his calling so as to make it offensive. In *Doe d. Bish v. Keeling* (2) it was held that keeping a school

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(1) Before Lord Denman, Ch. J., are omitted.

Taunton, Patteson, and Williams, JJ.
The arguments as to the first breach

(2) 14 R. R. 405 (1 M. & S. 95).

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was a breach of a covenant not to "use or exercise any trade or business whatsoever." It is clear, from the language of the covenant here, that trade and business are used in the same sense; for the covenant first provides against the "trades or businesses of a butcher," &c., and then adds "or any offensive trade." In fact this use of the premises is very analogous to that which would be made of them if they were turned into a tavern, except that the occupation by the occasional inmates would be less offensive in that case than in the present. It will be said that the Court leans against forfeitures; but it is impossible to give a different construction to a covenant when the action is ejectment, from that which could be given to the same instrument in an action of covenant. If this be a trade, there can *be no doubt, especially after the verdict, of its being offensive. Lord ELLENBOROUGH, in *Doe d. Bish v. Keeling*, expressed himself strongly as to the annoyance created even by schools (1).

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Sir James Scarlett, Thesiger, and Steer, contra :

The question of offensiveness was left too broadly to the jury. If they were to determine whether they would choose to live near such a house, the question becomes one of a more or less sensitive imagination; but the real question is, whether the mode of occupation was offensive to the senses. Independently of this, the occupation is not a trade at all, either in the technical or common sense of the word. Such a term was never applied to it before. In this lease, the "trades or businesses" mentioned relate merely to the occupations specified; then follows the general prohibition, which is confined to trade. If, however, it be true that "trade" and "business" are here used in the same sense, there is as much ground for saying that "business" is narrowed to "trade," as that "trade" is extended to "business." But the words are in fact used distinctly; and this was the view taken by LE BLANC, J. in *Doe d. Bish v. Keeling* (2). The words in that case differed very much from those in the present; there the prohibition was

(1) 14 R. R. 405 (1 M. & S. 99).

(2) 14 R. R. 406 (1 M. & S. 100).

general against “any trade or business whatsoever;” here, there is no general prohibition of any thing but a trade. The expressions of Lord ELLENBOROUGH, in that case, which have been relied upon on the other side, were beside the point; and the case of *Jones v. Thorne* (1) is stronger the other way. There, *the covenant, after providing against several specified “trades or businesses,” added the words “any other trade or business that might be or grow or lead to be offensive;” and it was held that using the premises as a public-house was no breach. It is not enough that there is a possibility of an occupation becoming offensive.

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Cur. adv. vult.

LORD DENMAN, Ch. J. in this Term (November 22nd) delivered the judgment of the COURT :

This was an action of ejectment on the forfeiture of a lease by virtue of a proviso for re-entry on breach of any of the covenants. The two breaches of covenant, for which the plaintiff had a verdict, were, pulling down a wall, and carrying on an offensive trade upon the demised premises.

With respect to the former, the defendant has entitled himself to a new trial, by raising considerable doubt whether the facts were fairly brought forward. It must be on payment of costs.

This, however, could avail him nothing, if the verdict could stand for the other and more important breach; and it has become necessary to consider whether the verdict recovered upon it can be sustained. The terms of the covenant are, that the lessee shall not carry on any of the trades or businesses enumerated, or any offensive trade whatever. (His Lordship here read the covenant.) The question is, whether these words comprehend every occupation carried on for the purpose of profit, and include the business of keeping a lunatic asylum, to which use the premises have been converted. It was argued that “trade” does not necessarily consist of buying and selling, though the bankrupt laws are restricted *to trades of that description; that the lessor’s obvious meaning was to interdict, not buying and selling merely, but any kind of occupation

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(1) 25 R. R. 546 (1 B. & C. 715).

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which is offensive, as the jury have expressly found this to be. But supposing these general observations to be correct, and that such must have been the object of requiring the covenant, we can only collect the obligation actually entered into from the terms of the contract. Now it commences with prohibiting trades as well as businesses, two words which may be synonymous, or may have a different meaning; and when we find, in the latter part of the sentence, that one of the words is retained and the other omitted, we cannot extend the meaning of that which is retained to the more general sense which may be given to that which is omitted. Every trade is a business, but every business is not a trade; to answer that description it must be conducted by buying and selling, which the business of keeping a lunatic asylum is not. This argument is strengthened by observing that the trades and businesses enumerated are conducted by buying and selling; and, if the same general word must be held to introduce any others in addition, these at least must be *ejusdem generis* with the former.

Therefore, as the verdict proceeded on the assumption that the defendant's business was a "trade" within the terms of this covenant, there must be a new trial on this point also.

Rule absolute.

1834.

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DOE D. RANDLE CHETHAM STRODE v. SEATON
AND OTHERS.

(2 Adol. & Ellis, 171—182; S. C. 4 N. & M. 81; 4 L. J. (N. S.) K. B. 13.)

A vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared; the attorney was paid for this business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft. It remained afterwards with the vendor's attorney: Held, that such draft was confidentially deposited with the latter, by the purchaser as well as the vendor, and could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney.

In ejectment, it appeared that the lessor of the plaintiff, to entitle himself to the property as heir-at-law, must deduce title through E. The title relied upon by the defendants was that of a party to whom E. had devised his remainder in the property, which remainder had been devised by J. to E. Among other evidence to identify the property in

question with that devised by J., a book was offered in evidence, containing entries of receipts of rent of the property in question, by a deceased steward of E.: Held, that the defendants were entitled to produce these entries in evidence against the plaintiffs, each party claiming under or through E.

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The defendants claimed by purchase from the heir of a devisee under E.'s will. The estate purchased was only a part of the property devised, and to which the steward's entries related: Held, that the defendants, although not entitled to the possession of the book, might insist upon having it produced in evidence as to that part of the property which had come to their hands.

Assessments of commissioners of the land-tax, by which it appears that at a certain time property was assessed in the name of S. (the family surname only), are evidence to shew, in connection with other facts, that at such time the property was occupied by a particular individual of the family(1).

EJECTMENT for messuages, &c. At the trial before Lord Denman, Ch. J. at the last Bristol Assizes, it appeared that the action was brought to recover possession of property in Broadmead, Bristol. The lessor of the plaintiff claimed under the will of Colonel John Strode, executed in 1806, whereby the said John Strode (who at that time held the property now in question) devised all his manors and other messuages, lands, &c., whereof he was then seised or in possession for any estate of inheritance or freehold, to the use of his nephew Thomas Chetham, for life, remainders to the first and other sons, and to the daughters, of T. C.; remainder to the testator's nephew Richard Chetham for life, with like remainders; remainder to the use of the testator's nephew Randle Chetham (afterwards Randle Chetham Strode) the lessor *of the plaintiff for life; remainders over. Colonel John Strode died in possession of the property, and without issue, in December, 1807. Thomas Chetham (then Thomas Chetham Strode) entered into receipt of the rents, and died without issue in September, 1827, and Richard Chetham (then Richard Chetham Strode) died, also without issue, in August, 1828.

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The defendants were devisees in trust under the will of John Weeks. As to Weeks's title, it appeared that in 1796 Colonel John Strode granted to Samuel Thomas a lease of the premises in question for twenty-one years at a certain annual rent.

(1) See also upon this last point *Doe d. Stansbury v. Arkwright*, 38 R. R. 851 (5 Car. & P. 575).—R. C.

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SEATON.

Samuel Thomas died in 1800, leaving an only daughter, who took out administration, and sold and conveyed the unexpired term under the lease to John Hall. Hall, in 1802, conveyed his interest to Weeks, who took possession, and regularly paid the rent until, and for some time after, the death of Colonel John Strode. By deeds of bargain and sale and of release bearing date the 28th and 29th of September, 1813, Thomas Chetham Strode conveyed the premises to Weeks in fee. The deed of release gave, by way of recital, a deduction of Thomas Chetham Strode's title, by which it was made to appear that the estate of Colonel John Strode in the premises was only a term of ninety-nine years, if he should so long live; the reversion or remainder expectant on his decease being in Thomas Chetham Strode, and having become vested in possession in him upon the death of Colonel John Strode.

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The plaintiff's counsel, in the course of their case, proposed to prove the conveyance from Hall to Weeks (which was by lease and release, passing the residue of Hall's unexpired term, with the fee-simple of other property), for the purpose of shewing, that in that conveyance *the demise from Colonel John Strode to Samuel Thomas was recited, and the reservation of rent therein stated to be "to the said John Strode, his heirs and assigns;" and they intended to rely upon this recital, as estopping those who came in under Samuel Thomas from claiming to retain the premises by a title adverse to that of Colonel John Strode as tenant in fee. Notice having been given to produce the original conveyance (which was not done), the plaintiff's counsel offered to give in evidence the draft from which it was prepared, and with this view they called Mr. Palmer, a solicitor, who, as well as Hall, had been served with a *subpoena* to produce the draft. Palmer produced it, and gave the following evidence: "I was attorney for Hall, and prepared a conveyance to Weeks. I was attorney for Hall and Weeks jointly; they paid me in moieties." On reference to a memorandum which was shewn to him, he added, "Mr. Osborne perused this draft for Weeks: I was employed specially by Mr. Hall alone: Mr. Osborne acted for Mr. Weeks: they paid me jointly after it was finished. There was the usual communication by sending a draft, and receiving

it back. I do not recollect the deeds being handed over, but have no doubt they were." Palmer and Hall did not object to the draft being read; but it was contended on behalf of the defendants, that, the preparation of this draft being a transaction in which Palmer had been engaged confidentially as the attorney of Hall, he ought not now to be called upon to produce or to give evidence respecting it to the disadvantage of those claiming under Hall: and *Fisher v. Heming* (1) was cited. The LORD CHIEF JUSTICE refused to admit the draft in evidence.

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No evidence was given for the plaintiff, to shew how Colonel John Strode became seised of the property in question. The title of Thomas Chetham Strode was deduced, by the defendants, as follows. The property, as alleged, descended from Carew Strode, who died intestate in 1740, to his eldest son and heir-at-law, James Strode. James devised all his estates (including, as the defendants maintained) that now in question, to his brother, Major Edward Strode, for 99 years, if he should so long live; and after the expiration, or other sooner determination, of that term, to John Strode (the Colonel John Strode before mentioned), second son of the said Edward Strode, for a like term, remainder to the first and other sons of John Strode successively in tail male, remainder over (which never took effect), remainder ultimately to the testator's own right heirs. James died in 1749, leaving the said Edward, his only brother and heir-at-law, surviving him. Major Edward Strode, by his will, made in 1764, devised all his remainder or reversion in fee-simple of the estates devised by James, to his own eldest son Edward, for life; remainders over (which never took effect); remainder, ultimately, to his own daughters, Elizabeth and Ann, in fee as tenants in common. He died in 1768, leaving his sons, Edward and John, and his daughters, Elizabeth and Ann, surviving him. Elizabeth married Lewis Boisdaine, and Ann married Thomas Chetham. Edward, the eldest son of Major Edward Strode, died without issue. Colonel John Strode, the second son, also died without issue. Elizabeth Boisdaine died intestate, leaving her eldest son and heir-at-law surviving her; and he afterwards, and after the death of Edward Strode, his

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(1) 1 Phill. on Ev. 132, 6th ed.

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mother's brother, by lease and release executed in February, 1793, conveyed all his *reversion or remainder in fee-simple expectant on the death of Colonel John Strode, and failure of issue of his body, to Thomas Chetham in fee. Thomas Chetham died intestate, leaving Ann, his widow, and Thomas Chetham (afterwards Strode), his eldest son and heir-at-law. Ann also died, leaving the said Thomas Chetham her heir-at-law, who thereby (according to the defendants' case) became entitled to the reversion and remainder in fee expectant on the death of Colonel John Strode. Richard Chetham Strode, and Randle, the lessor of the plaintiff, were the second and third sons of Thomas and Ann Chetham.

Among other evidence to shew that the property now in question was part of the estates to which title was thus made, the defendants' counsel put in a steward's book, containing entries of quit rents, and other rents of the Strode property in general, and, among the rest, of the premises in question in the time of Major Edward Strode, from 1754 to 1767. The entries began, "John Lydford" (the steward) "for Edward Strode, Esq., 8th November, 1754; list of tenants and rents:" and, for this and several years following, the steward charged himself with rent received for the Soap-house (part of the property now claimed) from P. Bowen. Messrs. Hyett and Maskell, attornies, had been engaged in the management of the property in the lifetime, and after the death, of Colonel John Strode. Hyett retired, and Messrs. Maskell and Phipps continued in the same employment till the lessor of the plaintiff succeeded (as he alleged) to the estates, when they, at his desire, delivered up to him the papers in their hands relating to the property. The steward's book, however, was found in Mr. Phipps's possession, among some papers of the Strode family which were considered as rubbish papers, a few days before the trial. It was objected to this evidence, *that the book, to be offered at all, must be considered as coming from the custody of an attorney for the lessor of the plaintiff; and that such a document could not be produced from the custody of an attorney against his client. The LORD CHIEF JUSTICE was of opinion, that the book, at the time of the conveyance to Weeks, was in the hands of Hyett and Maskell,

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as attornies for Thomas Chetham Strode, and that, as he could not have objected to the production of it in evidence against him if required by Weeks, the present lessor of the plaintiff could not take such objection. He therefore admitted the evidence.

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To identify the property in question still further, a clerk to the commissioners of land-tax produced assessments made upon occupiers of property during the lifetimes of James Strode and Major Edward Strode, in which the Soap-house and other premises named as in the steward's book, appeared to be assessed in the name of "Strode," merely, and afterwards in that of Bowen, the tenant; and the defendant's case was, that a part of these entries corresponded with those in the steward's book in point of time and description of occupation, and that some of the entries in the steward's book shewed allowances to have been made to Bowen for the corresponding charges of land-tax. It was contended that the assessments were not evidence; but the LORD CHIEF JUSTICE received them subject to the objection.

His Lordship, in the course of his summing up, stated to the jury that the lessor of the plaintiff had proved a *prima facie* seisin in fee in John Strode; that the defendants' case rested on the will of James Strode; and that the steward's book was evidence of Major Edward Strode having been possessed of the property in question; he also referred to the land-tax assessments; *and he left it to the jury to say, upon the whole case, whether Colonel John Strode enjoyed a life estate only, which he took under the will of James, or an estate in fee, which would entitle him to make the devise on which the lessor of the plaintiff rested his case. The jury found a verdict for the defendants.

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Bompas, Serjt. in this Term moved for a rule to shew cause why there should not be a new trial, on the grounds, that evidence had been improperly rejected and admitted in the instances above mentioned, and that there had been no evidence to shew that the property in question, alleged to have passed by the will of James Strode, had ever been in his possession. First, as to the draft of the conveyance to Weeks. It was not a subject of professional confidence. The preparation and approval of it were a transaction between two adverse parties; Palmer making

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the draft for Hall, and Osborne approving it on behalf of Weeks. What passes between opposing parties cannot be a confidential communication (1). This was in the nature of an agreement. Although it is usual for the purchaser to draw the conveyance, the vendor here caused the deed to be prepared; the draft remained in the hands of his attorney, and was the vendor's property; he, or his attorney, was bound to produce it, since it was no part of his title-deeds, *Doe d. Courtail v. Thomas* (2); and if it had been one of his title-deeds, there was no reason that it should not have been produced, the owner being in Court and making no objection.

(PATTESON, J. : How came the draft to be left in the attorney's possession ?)

[*178] It *is commonly done.

(TAUNTON, J. : It is so, but it is an act of negligence. The draft is the client's property (3).)

Secondly, as to the steward's book; the attornies who produced it must be taken to have held it as attornies for the lessor of the plaintiff, and could not be called upon to give it in evidence against their client.

(PATTESON, J. : They became possessed of it as attornies for Colonel John Strode, not as attornies for the lessor of the plaintiff.)

If they continued to hold this book after he became entitled, they held it as his attornies. Parties claiming under Weeks, who alleged himself to be the purchaser of a small portion of the estates, could not, on that account, demand the production of the book as evidence for them.

(LORD DENMAN, Ch. J. : Why not, if it related to that portion as well as to the rest of the property ?)

The entries of receipts in this book are not evidence against the

(1) See *Griffith v. Davies*, 39 R. R. 547 (5 B. & Ad. 502). (3) *Ex parte Horsfall*, 31 R. R. 266 (7 B. & C. 528).

(2) 32 R. R. 680 (9 B. & C. 288).

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lessor of the plaintiff, because he does not claim under James Strode or Major Edward Strode. Thirdly, the land-tax assessments were not available to shew that the property, supposed to be thereby referred to, was in the ownership of James or Major Edward Strode. Assessments in the name of "Strode" only are no evidence: *Doe d. Stanbury v. Arkwright* (1).

(PATTERSON, J.: That case does not shew that they are no evidence: it only shews that assessments in the name of "Strode" merely, would not prove any particular person to have been in the occupation. But the entries here are to be coupled with the evidence of the steward's book.)

At any rate they prove nothing as to James. The assessments were upon occupiers; and, therefore, those in the name of "Strode" *would, at most, only prove that, when they were made, persons of the name of Strode occupied, not that they were owners of the premises. And the tendency of the evidence is to shew that James Strode was neither owner nor occupier. (He then went into the evidence on this point.)

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TAUNTON, J.:

With respect to the first point in this case; it has been urged that the draft which remained in the hands of Palmer was not to be considered a privileged deposit. Whether this was so or not it is unnecessary to say, except thus far. I have always understood it to be a clear rule that a party is not bound to produce any deed in which he himself has an interest; though if his interest leads him to produce it, he then only exercises a power which the law of course gives him. In this case, Palmer, who held the draft, was the joint agent of both vendor and vendee with respect to it. He could not produce it without the consent of both, and was not, therefore, compellable to do so, not having the consent of the parties representing Weeks. I am also of opinion that the steward's book was properly received in evidence, inasmuch as both parties in this cause claim under or through a person to whom this book belonged at the time when

(1) 38 R. R. 853 (2 Ad. & El. 182, n.; 1 Nev. & Man. 731).

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the entries were made. And as to the question whether the evidence supports the verdict, I cannot say that I think the LORD CHIEF JUSTICE did wrong in leaving the case to the jury, or that there is any distinct ground upon which the verdict ought to be disturbed.

PATTESON, J. :

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As to the first point I had some doubt, but, looking at the whole evidence, I think it is clear *that the draft could not have been in the possession of Palmer as attorney for the vendor in the ordinary course of business. It is not usual for the vendor to make the draft of conveyance. It is true that there was an attorney here employed for the vendor, but his employment was only for the purpose of approving the draft. Palmer, then, had an employment on behalf of the vendee, referring to the very particular thing which it was proposed to give in evidence. Now, if an attorney keeps a draft, he must keep it according to the nature of his original employment, and subject to the rights of both the parties (if two) by whom he was employed. One or the other of them has a right to say that he shall not produce it. If Palmer had been an attorney for the vendor, who had not prepared the draft, or if he had not been employed by the purchaser, I do not say that he might not have given evidence as to the contents of the deed; but his employment on behalf of the purchaser precludes him from it. On the second point, I think the steward's book was properly admitted. It is said that Major Edward Strode, in whose time the entries referred to in that book were made, is not a person under whom both the present parties claim; and that is true, strictly speaking. But both claim through him. The lessor of the plaintiff, who claims under Colonel John Strode, must derive the title of the latter through Major Edward Strode; and so also, according to their own case, must the defendants, who entitle themselves by the will of James Strode. The claim of the one party is through Edward; that of the other is under James and through Edward also. The argument on behalf of the plaintiff assumes that the defendants, who require the production of this book, are strangers; but Weeks, whom *they represent, is in the situation of one of the family,

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for he purchased from Thomas Chetham Strode, and therefore had the same rights with respect to the book as Thomas himself had. If Thomas could have given it in evidence, Weeks might also. He might not, indeed, be entitled to the possession of it, because it contained entries relative to other property; but he would have had a right to call for the production of it, so far as it concerned the property he had purchased. As to the question upon the general result of the evidence, the facts are numerous and complicated, but I see no reason to dispute the verdict.

WILLIAMS, J. :

I am of the same opinion. Palmer was employed by the purchaser to a certain extent, as well as by the vendor. His readiness to produce the draft could make no difference, for it has been long settled, that the privilege in respect of confidential communications is the privilege of the client. As to the steward's book, I think the defendants had clearly a sufficient interest in it to entitle them to its production. It would be very daring to pronounce as to the weight of evidence; it is sufficient to say, that the verdict is not shewn to have been wrong.

LORD DENMAN, Ch. J. :

I will add nothing to what has been said by the rest of the Court upon the first point. As to the steward's book, I think it would have been a fraud in the family of Strode to wish to hold back from a purchaser the evidence which that book supplied. If it related to nothing but the property he had purchased, he clearly was entitled to the production of it: if it referred to other estates also, there is still no *reason that he should not have been enabled, by means of it, to prove the facts which concerned his own property. The main question in the cause was, whether the premises in question had come rightfully to the lessor of the plaintiff by the will of Colonel John Strode, and whether Thomas Chetham Strode had conveyed to Weeks without being entitled to do so. That depended upon a number of deeds, upon the assessments, and upon a great deal of other evidence, which was very largely discussed on both sides, and I think the verdict was correct.

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Rule refused.

1834.
Nov. 19.
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REX v. GWYER AND MANLEY.

(2 Adol. & Ellis, 216—229; S. C. 4 N. & M. 158; 4 L. J. (N. S.)
M. C. 39.)

Overseers of the poor may not charge the parishioners, in their accounts, with the following payments:

For making poor rates;

For making divisions of the same;

For making copy of the same for the collectors;

Payments to an accountant for examining, making up, and entering the accounts of the year, and list of defaulters on the rates;

Poundage paid for collecting the rates;

Although such charges have been authorized by resolutions of vestry.

A parishioner appealed against overseers' accounts for the year, containing the above items. Three rates, (referred to by the items,) had been made during the year. The appellant was assessed to the second only, but he was assessed to the rates of the following year, and until the time of the appeal. Some of the above items related to periods not within the time for which the appellant was rated. It did not appear which of the rates was applied to any of the disbursements objected to: Held, that the appeal lay.

On appeal against the accounts of Henry Wyndham Gwyer and Samuel Manley, as overseers of the poor of the parish of Bedminster in the county of Somerset, at the instance of Richard Lindsey Sutton, the Sessions allowed some of the items, wholly disallowed others, and disallowed some subject to a case. The appeal was against two accounts; one, for the period from the 25th of March to the 29th of September, 1832, the other, from the last mentioned day to the 25th of March, 1833. The case was as follows:

The appellant was a parishioner of Bedminster, and rated in the second only of three rates made during the year. The first rate was made April 26th, 1832; the second, October 4th, 1832; the third, February 11th, 1833. The appellant was also rated from the 25th of March, 1833, to the time of the appeal. Some of the items objected to in the notice of appeal, and disallowed by the Sessions, were the following:

6l. 6s. for making the poor-rates in October, 1832, and February, 1833.

5l. 5s. for making two divisions of the same.

3l. 10s. for making a copy of the said rates for the collectors.

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12*l.* 6*s.* paid to the accountant for examining, making up, and entering the accounts of the year, and the list of defaulters in each of the three rates.

66*l.* 19*s.* 9*d.* paid poundage for collecting 2,679*l.* 14*s.* 6*d.*

Two other items of 39*l.* 1*s.* 3*d.* and 11*l.* 13*s.* 6*d.*, for like poundage.

The parish of Bedminster is twenty-one miles in circumference, and contains a population of 13,000 persons. The sums collected for the relief of the poor amounted in each year to 8,000*l.* and upwards. In the year from March, 1832, to March, 1833, there were, as usual, two churchwardens and four overseers. Before this year the parish had an assistant overseer, but there was no evidence of his appointment. The parish had employed an accountant to make up their accounts, and when a new rate was made, the accountant was employed to draw out a list of defaulters, and such list, for the three rates made in this year, occupied 150 folio sheets. In this year the vestry allowed a clerk a salary of 50*l.* to assist the overseer, but it was no part of his duty as clerk to do any business for which any of the sums above mentioned are charged.

The affairs of this parish are managed by a common-law vestry, and, at a vestry duly held on the 2nd of April, 1832, it was resolved "That, in the present embarrassed state of the parish, no assistant overseer or overseers be elected, but that power be given to the present overseers to call in what assistance they may stand in need of." This was signed by the chairman of the meeting, and remained in the book in which the *resolutions of the parish were generally entered, and which each parishioner had power to inspect. Under the authority of this resolution the several sums hereinbefore mentioned were expended by the overseers who required assistance. The sums paid for poundage were paid to collectors for collecting the monies due on the three rates.

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Besides the general resolution before mentioned, the vestry, duly held on the 9th of September, 1831, came to the resolution following (which was entered in the same book): and one question for the opinion of the Court was, whether this, not having been passed during the overseers' year, was admissible

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in evidence on the present appeal? (1) "Resolved that Mr. Harpur be paid and allowed at the rate of 6*d.* in the pound upon all sums collected, including the expenses incident to proceedings before magistrates, and that the same be allowed in the overseers' accounts." This resolution has never been rescinded, and Mr. Harpur collected the rates and was paid fresh poundage up to the 4th of October, 1892; and he also collected the first rate, and received as poundage 66*l.* 19*s.* 9*d.*

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On the 4th of October, 1892, at a similar vestry, it was resolved, "That a rate of 4*s.* in the pound be granted to the overseers for the relief of the poor, and that the sum of 4*d.* in the pound be allowed the overseers for collecting the same." This rate was collected by certain collectors, who received for their labour the before-mentioned sum of 39*l.* 1*s.* 3*d.*, being *4*d.* in the pound on monies collected by them upon the said rate.

At a meeting of the same vestry, on the 21st of February, 1893, at which the appellant was present, it was "Resolved that Mr. James Blake and Mr. John Hurford be appointed collectors for the third rate for the present year, and that they be respectively paid 6*d.* in the pound on the amount of their collection, and that the sum be allowed in the present overseers' accounts." The appellant did not sign this resolution. Under the sanction of it, Mr. Blake and Mr. Hurford collected the third rate and received 11*l.* 13*s.* 6*d.*, being the poundage on their respective collections. All the other sums, herein-before mentioned were paid by the overseers to other persons for work *bonâ fide* done. The charges were reasonable and fair. The question for the opinion of the Court was, whether, under any of these resolutions, or otherwise, the overseers had any authority to include these items in their accounts?

Jeremy and Moody, in support of the order of Sessions. * * *

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Rogers and Bere, contra. * * *

(1) On this question, *Rogers*, in opposition to the order of Sessions, referred to *Mawley v. Barbet*, 2 Esp. 687; but the point was not further

discussed, the appellant's counsel relying upon the invalidity of such resolution, whenever made.

LORD DENMAN, Ch. J. :

This was an appeal against overseers' accounts from the 25th of March, 1882, to the *25th of March, 1893; and it has been contended that the appellant, not having been a rated parishioner during the whole of that time, cannot object to such part of the accounts as related to the expenditure before that period for which he was rated. I think, however, that he was at liberty to do so, because he had an interest in all the money that came to the hands of the overseers during the periods in question. As the surplus of that money was reduced, the subsequent assessments upon him would probably be greater in proportion, and therefore, if there was an illegal application of the fund, he is not precluded from objecting to it. The question then is, whether the Sessions were right or not in disallowing the items mentioned in the case. Circumstances are stated which go to make it extremely reasonable that they should be allowed; but the question is, whether there be any such power. The items are not distinguishable in principle. Cases may be supposed where, in default of such allowance, a very heavy burden will be thrown upon overseers; but, unless the law provides for such cases, the inconvenience cannot be avoided. Now I see no difference between refusing the overseer a salary, and refusing the means by which he may employ another person at a salary; if one cannot be granted, neither can the other; and that being so, *Rex v. Welch* (1), *Rex v. The Earl of Ashburnham* (2), and *Rex v. Glyde* (3) are authorities which cannot be got over. The situation of the overseers in this respect is that of all persons upon whom the law casts burdensome duties without remuneration. It is said that a part of this expenditure had *been expressly consented to by the parishioners in vestry; but in *Rex v. Welch* (1) the appointment of an assistant overseer at a salary had been agreed to in the same way. It is impossible to make these proceedings in vestry a contract, to bind the right of any person who chooses to appeal. A vestry cannot bind the parishioners by acts which it is not authorized to do. The

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(1) 1 Bott, c. 3, s. 4, pl. 346, note (4), 4th ed.
p. 341, 6th ed.

(3) 2 M. & S. 323.

(2) 2 Nol. P. L. c. 35, s. 8, 462,

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respondents do not contend that the overseers in this case have acted in execution of the particular powers given by 59 Geo. III. c. 12, s. 7. It appears to me that that clause gives the true remedy for the inconvenience now complained of; namely, by appointing assistant overseers in the manner there pointed out (1). It is unfortunate that that was not done here. Upon the whole, I am of opinion that these expenses, however reasonable and necessary, and however they may have been for the benefit of the parish, are not such as the overseers in the execution of their office could bring upon the parishioners; and therefore not such as could be charged in these accounts.

TAUNTON, J. :

I am of the same opinion. Although the charges may have been reasonable, still, if the Court sees that they were not necessarily connected with the fulfilment by these parties of their office as overseers, they cannot be allowed. In Mr. Wilcock's treatise on "The Laws relating to the Ordering, Relief, and Settlement of the Poor," which, as far as I have seen, is a very useful compendium, the law is thus stated (2): "They" (the overseers) "are entitled to charge in their accounts whatever they have spent for the parish under the direction of any statute, order of justices, or legal process; whatever they have *bonâ fide* and legally disbursed in relieving paupers, where it was their duty to relieve, in providing stock for the children of indigent parents and persons having no means of gaining a livelihood, in the disposal of stock for these purposes, for the costs of orders of maintenance or removal, or of an appeal, though decided against them, unless they have been guilty of gross misconduct, or of neglecting to consult the vestry as to the propriety of proceeding in it when there was convenient opportunity, in repaying the legal disbursements of constables, and all other money fairly laid out in the business of the parish." And several instances of charges which the overseers may or may not make, are given, by way of illustration, from cases

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(1) See now also The Poor Law Act, 1879 (42 Vict. c. 6), s. 4.—
Amendment Act, 1834 (4 & 5 Will. IV. R. C.
c. 76), s. 46, and The District Auditors (2) P. 281.

which have been cited in the present argument. Looking at the charges in this case, it appears that none of them were incurred by the officers in the necessary performance of their personal duty as overseers. There is an item for making rates. If it had been necessary that a survey should be taken for that purpose, the case would have been different; but, if nothing is wanted but the mental trouble of calculating, and the manual trouble of transcribing, those are labours which the office of overseer throws personally on the individual himself. So, too, the items for making divisions of the rates, for examining, making up, and entering the accounts, and for poundage, are altogether without authority. Where an officer is called upon by statute to do a duty including such particulars as these, he must do it gratis, unless the statutes give him a remuneration. No office can be more burdensome than that of a sheriff, yet he can recover nothing more for issuing *warrants than the fee allowed by stat. 28 Hen. VI. c. 9: *Dew v. Parsons* (1). In the present case, therefore, however laborious the duties may have been, and however clear it may be that the expenses were incurred *bonâ fide*, the overseers cannot receive the remuneration contended for.

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PATTESON, J. :

It appears, by the finding of the Sessions, that these charges were reasonable and in no way dishonest, and that they were incurred under the sanction of the vestry. But if the vestry had no power to allow them, the overseers are but in the situation of any other parties acting under those who have no authority. I cannot distinguish this case from *Rex v. Welch* (2). It is said that the office there (of a salaried assistant overseer) was altogether an illegal one; but I do not see how it was more illegal there to appoint an assistant overseer, than it was to appoint collectors and other assistants in the present case. These charges were assimilated, on the part of the respondents, to charges for law expenses, which have been allowed because it was necessary, when litigation began about settlements, that parishes should defend themselves. But the same analogy, if

(1) 21 B. R. 404 (2 B. & Ald. 562).

(2) 1 Bott. c. 3, s. 4, pl. 346, p. 341, 6th ed.

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admitted, would extend to all cases of expenditure for any thing that was said to be necessary. I do not say how it might be if there were something to be performed which the overseers could not execute themselves. But, looking at these items, all of them are for things which the overseers might have done in their own persons, however inconvenient it might have been : and if they could not themselves have performed *them, assistant overseers might have been appointed under 59 Geo. III. c. 12, s. 7. The vestry, therefore, had no power to sanction these expenses. Authorities have been cited to shew the power of a vestry to bind the parishioners. If the vestry be assembled for a legal purpose, they may bind the parishioners, both present and absent : but if every individual in the parish were present, they could not bind any one for an illegal purpose. As to the right of this party to appeal, I think he was entitled to do so. If he had appealed against a rate to which he was not assessed, the case might be different. It does not appear here out of what particular rate the allowances were made in respect of the charges objected to. The remuneration for collecting is given in the way of a poundage on the several rates, but it does not appear that it was made out of the rates respectively. At all events, allowances out of one rate would increase the amount of a subsequent one, if it did not altogether impose the necessity of making it. I do not see how this party could have appealed except in the way he has adopted.

WILLIAMS, J. :

I am of the same opinion. The cases cited for the appellant proceed upon the ground that rates must be applied strictly in a particular way, unless any law can be shewn, authorising for a different disposition of them. None such was pointed out here. As to the appellant, he might very well have such an interest as entitled him to appeal, since it does not appear out of what rate the disbursements were made.

Order of Sessions confirmed.

DOORMAN v. JENKINS.

(2 Adol. & Ellis, 256—266; S. C. 4 N. & M. 170; 4 L. J. (N. S.) K. B. 29.)

1834.
Nov. 20.
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In *assumpsit* against a bailee, it was proved that the defendant, a coffee-house keeper, having custody of money without reward, lost it, and made the following statement: that he had unfortunately put it, with a larger sum of money of his own, into his cash-box, which was kept in his tap-room; that the tap-room had a bar in it, and was open on a Sunday, but the rest of his house, which was inhabited, was not open on Sunday; and that the cash-box, with his own and the plaintiff's money, had been stolen on that day.

The Judge left it to the jury whether the defendant was guilty of gross negligence; and he told them that the loss of the defendant's own money did not necessarily prove reasonable care (1).

The jury having found for the plaintiff: Held,

First, that the question of gross negligence was properly left to them.

Secondly, that there was evidence upon which they might find for the plaintiff.

ASSUMPSIT. The first count of the declaration alleged that, in consideration that the plaintiff, at the request &c., had delivered to the defendant and placed in his charge and custody a sum of money, to wit the sum of 32*l.* 10*s.*, of the plaintiff, for the purpose and in order that the defendant might therewith take up and pay for the plaintiff a certain bill of exchange made &c., when the same should become due and be presented, and in consideration that the defendant then and there had the said monies in his hands upon the terms and for the purpose aforesaid, the defendant undertook &c., that he would with the said money take up &c. Breach, that the defendant did not take up &c., when the bill was presented for payment. The second count alleged that, in consideration that the plaintiff, at the request &c., would deliver to the defendant the sum of 32*l.* 10*s.* of the plaintiff, provided by him for the purpose of taking up and paying a certain bill of exchange made &c. (as before), the defendant undertook &c. that he would take due and proper care of the said sum of money whilst in his hands in the meantime and until the bill should become due &c. Averment, that the plaintiff delivered the sum to the defendant for the purpose aforesaid. Breach, that the defendant did not take due and proper

(1) The correctness of this ruling was affirmed by the judgment of the Judicial Committee of the Privy Council in *Giblin v. McMullen* (1869) L. R. 2 P. C. 317; 38 L. J. P. C. 25.—R. C.

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care; but, on the contrary *took so little and such bad care, that afterwards to wit, &c., the said sum became, and was and is wholly lost to the plaintiff. The third count omitted all mention of the bill of exchange, but stated that, in consideration that the plaintiff, at the request &c., had delivered the sum, &c., to be kept and taken care of by the defendant for the plaintiff, the defendant undertook &c., to take due and proper care of the sum, &c., whilst under his charge. Breach, that the defendant did not nor would take proper care, &c.; but on the contrary thereof, whilst the same was in his charge, took so little and such bad care thereof, and conducted himself so negligently and improperly in the premises, that &c. (loss as before). Counts for monies &c., and account stated. Plea, the general issue.

On the trial before Denman, Ch. J., at the London sittings in December, 1833, the plaintiff proved the delivery of the money to the defendant for the purpose of the bill being taken up as alleged in the declaration. The defendant was the proprietor of a coffee-house, and the account which he was proved to have given of the loss was as follows: That he unfortunately placed the money in his cash-box, which was kept in the tap-room; that the tap-room had a bar in it; that it was open on a Sunday, but that the other parts of the premises, which were inhabited by the defendant and his family, were not open on Sunday; and that the cash-box, with the plaintiff's money in it, and also a much larger sum belonging to the defendant, was stolen from the tap-room on a Sunday. The defendant did not pay the bill when presented. The defendant's counsel contended that there was no case to go to the jury, inasmuch as the defendant *being a gratuitous bailee, was liable only for gross negligence; and the loss of his own money, at the same time as the plaintiff's, shewed that the loss had not happened for want of such care as he would take of his own property. The LORD CHIEF JUSTICE refused to nonsuit the plaintiff, but took a note of the objection. The defendant called no witnesses. His Lordship told the jury that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added, that the fact relied

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upon was no answer to the action, if they believed that the loss occurred from gross negligence; but his Lordship then said that the evidence of gross negligence was not, in his opinion, satisfactory. Verdict for the plaintiff. In Hilary Term last, *Sir James Scarlett* obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit be entered, or a new trial be had.

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Sir John Campbell, Attorney-General, and *R. V. Richards* now shewed cause :

No leave was reserved to enter a nonsuit. The plaintiff does not contend that the defendant, being a gratuitous bailee, is liable for other than gross negligence. It is a well known principle, that, in contracts which are beneficial solely to the owner of the property holden by another, the holder is responsible for nothing less than gross neglect (1). The question of neglect was for the jury; it cannot be said that they had no evidence before them. Keeping the money in an open tap-room was, at any *rate, conduct which the jury might interpret as gross negligence; the more so, as the defendant himself described this as unfortunate. He might have placed the money in the inhabited part of the house. That his money was in the same place with that of the plaintiff is no answer; it does not follow that a person who is grossly careless in keeping his own property, is entitled to be as negligent in keeping that of another. The marginal note of *Shiells v. Blackburne* (2) would indeed, at first sight, appear to countenance the doctrine that such a defence was good, and that, as a pure matter of law, the action would not lie. But the case itself was decided simply on the ground that gross negligence was not in fact proved. The alleged neglect consisted in entering some dressed leather, some of which belonged to the bailor and some to the defendant, as wrought leather, at the Custom House, which was a mistake not implying extraordinary carelessness. This appears to have been the view taken by all the Judges.

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Sir J. Scarlett and Comyn, contra :

The Judge having taken a note of the objection that there was

(1) *Jones on Bailments*, p. 22 (II. 2), (2) 2 R. R. 750 (1 H. Bl. 158).
and further, p. 119 (III. 2).

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no case for the jury, it must be understood that leave to enter a nonsuit was reserved. The defendant does not contend for the absolute proposition, that a gratuitous bailee, who keeps another person's goods as carefully as his own, cannot become liable for the loss, or be guilty of gross negligence. The objection to this verdict is, that the plaintiff, upon whom the burthen of proof lay, did not make out a *prima facie* case of gross negligence. The Court is to determine, whether the facts proved *satisfied the words "gross negligence." The mere loss of the goods, of course, cannot supply a *prima facie* case. The proof here went, at the utmost, no further than the proof in *Shiells v. Blackburne* (1); and the loss of the defendant's own goods was at any rate a strong fact in his favour. In *Shiells v. Blackburne* (1) the COURT decided the question whether the facts made out a legal case of gross negligence, and set aside the verdict because they did not.

TAUNTON, J. :

I have felt some doubt in this case; but, after the best consideration I can give it, I think the rule ought not to be made absolute. The counsel for the plaintiff properly admitted that, as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action would not be maintainable, except in the case of gross negligence. The sole question, therefore, is, whether there was any proof of such negligence. If there was, the application for a nonsuit, at any rate, cannot be granted; and it is almost (though not quite) equally clear that the defendant must be bound by the decision to which the jury has come. A great deal has been said on the point, whether the existence of gross negligence is a question of law or fact. It is not necessary to enter into that as an abstract question. Such a question will always depend upon circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for negligence turns upon matter of law rather than fact. *It charges the attorney with having undertaken to perform the business properly, and alleges that, from his failure

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so to do, such and such injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the Court told the jury that the injurious results did, in point of law, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet, even there, the jury have to determine whether, in point of fact, the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon, for negligence in the treatment of his patient. What law can there possibly be in the question, whether such and such conduct amounts to negligence? That must be determined entirely by the jury. Without, therefore, laying down any abstract rule, we may, I think, with perfect safety say that, in the present case, the question was entirely for the jury. It is fact, not law. The circumstances are extremely simple. The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it, together with money of his own (which I think perfectly immaterial), into the till of a public-house. We might certainly have had more explicit evidence as to the exact state of the box; in what place it was; and what class of strangers frequented the room. If there was no negligence, if the box was locked up and put in a safe place, and proper care taken of it, these were circumstances which the defendant had the best means of knowing, and, knowing them, he might have exonerated himself. In the absence, therefore, of evidence to that effect, I think that there was a *primâ facie* case of gross negligence, which required an answer on the defendant's part. The phrase "gross negligence" *means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree. The case of *Shiells v. Blackburne* (1) created at first some degree of doubt in our minds. It was said that the Court, in that case, treated the matter as a question of law, and set aside the verdict, because the thing charged, the false description of the leather in the entry, did not amount to gross negligence; and therefore the jury had mistaken the law. I do not view the case in that light. The jury there found, that in fact the defendant had been guilty of negligence; but the

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(1) 2 R. R. 750 (1 H. Bl. 158).

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Court thought that they had drawn a wrong conclusion as to that fact. The case, therefore, does not stand against the conclusion to which I have come. It does not appear certainly from the report, how the case was treated at the trial, nor what the Judge said in summing up. But I do not find it laid down, as a rule, that in every case the question of negligence is to be matter of law. The ordinary practice is, to leave it to the jury, whether such negligence has been proved as the plaintiff has charged in his declaration. If the negligence so charged be insufficient to give a right of action, the defendant may move in arrest of judgment.

PATTESON, J. :

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It is agreed on all hands that the defendant is not liable, unless he has been guilty of gross negligence. The difficulty lies in determining what is gross negligence, and whether that is to be decided by the jury or the Court. If the Court is to decide it, and no evidence has been given that satisfies the Court, there ought to have been a nonsuit. If the *jury was to decide, I cannot feel a doubt that there was some evidence for them. I agree that the *onus probandi* was on the plaintiff. It appeared, by the evidence of what the defendant had said, that the money committed to his charge was laid in a box in the tap-room, which room was open on a Sunday, though the rest of the premises were not. Under these circumstances, there can be no nonsuit ; for there was a sufficient case to go to the jury. Whether, in the abstract, the question of negligence be for the jury or the Court, I think it unnecessary, as my brother TAUNTON says, to determine. The present, at all events, was a question of fact, and therefore for the jury. The general question I approach with much diffidence. I do not know any thing more difficult, than to say, in mixed questions of law and fact, what is for the Court, and what for the jury. In the present case, the principal doubt in my mind arose from the case of *Shiells v. Blackburne* (1). The facts in that case were not disputed. It appeared that the defendant, being employed (without reward) to send out some dressed leather, entered it at the Custom House, together with

(1) 2 R. R. 750 (1 H. Bl. 158).

some dressed leather of his own, as wrought leather, in consequence of which the whole was seized. Whether that amounted to gross negligence, must have been a question for the jury. The report does not say how they were directed, nor whether the Judge told them that, in his opinion, it was gross negligence. At first, I conceived that nothing appeared from the report, except that the Court thought it was not a case of gross negligence. But, on looking into the case, I find the Court thought that the jury *had found the fact erroneously, and sent the issue to another jury. So that, in the present case, the only remaining question is, whether the Judge left the question properly. At first, I understood that the question left had been, whether the defendant had used ordinary and reasonable care, which, although it may be a useful criterion in determining the question whether there has been gross negligence, is certainly not the same question. But it seems that his Lordship left it to them to say, whether there had been gross negligence; and that what he said respecting ordinary care, was merely by way of illustration. We cannot, therefore, disturb the verdict. Whether I should have found the same verdict, is quite immaterial.

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WILLIAMS, J. :

The only question before us is, whether the Judge should have said that the case was not made out on the part of the plaintiff, or should have left it to the jury? If the Judge be obliged to lay down a rule, it is extremely difficult to discover what that rule ought to be. Who can say where "gross negligence" begins? Can it be other than a question of fact? The case was properly left to the jury. The report of *Shiells v. Blackburne* (1) does not state how the case was submitted to the jury. In *Reece v. Rigby* (2), which was an action against an attorney for negligence, ABBOTT, Ch. J. left it to the jury to say, whether, under the circumstances, the defendant had used reasonable care and diligence: he did not take it from their cognizance, and pronounce his own opinion; and the verdict was not disturbed. In *Moore v. Mourgue* (3), *where the defendant was charged with negligence

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(1) 2 R. R. 750 (1 H. Bl. 158).

(3) 2 Cowp. 479.

(2) 23 R. R. 251 (4 B. & Ald. 202).

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in insuring at a wrong office, Lord MANSFIELD states his own direction thus: "My direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted *malâ fide*, they should find for the plaintiff." In that case, again, we see that the Judge did not take into his own hands, as a question of law, what was gross negligence and what not; and there the Court above would not grant a new trial. On the facts which were before the Judge, in the present case, it would have been impossible for him to pronounce a rule. It is a question of less general importance, whether, under the particular circumstances, there was any evidence to go to a jury; but I think there was. Whether there was enough to satisfy their minds properly, is another question: one man's judgment is satisfied with a certain degree of evidence, another's mind with less; but I question if it can be said that the manner in which this money was left in the tap-room, was not loose custody. At all events, there was evidence for a jury.

LORD DENMAN, Ch. J.:

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It appeared to me that some degree of negligence was clearly proved in the first instance. I thought, and I still think, it impossible for a Judge to take upon himself to say whether negligence is gross or not. I agree to all the legal doctrine in *Shiells v. Blackburne* (1), which is, merely, that a bailee without reward is not liable to an action without proof of gross negligence. I do not find a word there to the effect that the Judge is to say whether, in fact, negligence is gross or not. I certainly did not take the view which *the jury did of this case, and I pressed, as strongly as possible, my opinion upon them. Whether, if I had heard all they said to each other, and had possessed all their experience, I should have changed my opinion, I cannot say; but certainly the question was for them.

Rule discharged.

(1) 2 R. B. 750 (1 H. Bl. 158).

BOWMAN *v.* TAYLOR AND OTHERS (1).

(2 Adol. & Ellis, 278—295; S. C. 4 N. & M. 264; 4 L. J. (N. S.) K. B. 58.)

1834.
Nov. 21.

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Declaration in covenant stated that, by indenture, after reciting that plaintiff had invented certain improvements in the construction of looms, and had obtained letters patent for such invention, and that he had agreed with defendants to let them use the said invention for a certain part of the term granted by the letters patent, in consideration of certain covenants, &c., plaintiff covenanted to permit defendants to use and have the benefit of such invention and patent, and defendants, in consideration of the grant, &c. covenanted to perform the agreement on their part. Breach, non-performance. Pleas, after setting out the patent, that the supposed invention therein, and in the declaration mentioned, was not nor is a new invention; and that plaintiff was not the first or true inventor of the improvements in the said indenture and letters patent mentioned:

Held, on general demurrer, that, if the pleas amounted to a denial of the plaintiff having invented the improvements, in the sense in which the deed alleged him to have done so, the defendants were estopped by their recital in the deed from contradicting that fact. And, that, if the pleas did not amount to a denial, but were intended merely to allege that the plaintiff was not the sole inventor, or that the invention had taken place long before the patent was granted, the pleas were no answer to the action.

There may be an estoppel by matter of recital.

COVENANT. The declaration stated that by indenture of the 10th of May, 1824, after reciting that the plaintiff had invented certain improvements in the construction of looms for weaving, commonly termed "power looms," and had obtained his Majesty's letters patent containing a grant to the plaintiff, his executors, &c., for the sole use, benefit, and advantage of the said invention, with full power to vend the same for a certain term of years, and that the plaintiff had, by an instrument in writing under his hand and seal, described and ascertained the nature of the said invention and the manner of performance, and had caused such instrument to be enrolled agreeably to the terms and conditions of the said letters patent; and that the plaintiff had agreed with the defendants to *permit them to use the said invention in manufacturing woollen and worsted for such a quantity of the said looms as the defendants should order or give directions for the making of within three years from the

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(1) Cited and followed by WILLES, J. in *Smith v. Scott* (1859) 6 C. B. (N. S.) 771; 28 L. J. C. P. 325.—R. C.

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date of the said indenture, not exceeding 500 in the whole, for so long of the said term granted by the said letters patent as was then unexpired, subject to the regulations and in manner therein-after contained, in consideration of the sum of 2*l.* 2*s.* as a premium to be paid for each loom, exclusive of the price of such loom, at or before the delivery of the same, and upon certain other terms which the declaration stated, the plaintiff, for and in consideration of the said sum of 2*l.* 2*s.*, &c., and of the covenants and agreements in the said indenture contained on the part of the defendants, did, for himself, his heirs, executors, &c., covenant, promise, and agree to and with the defendants, their executors, &c., that the plaintiff, his heirs, &c., should and would permit and suffer the defendants to use and have the benefit and advantage of the said invention and the said letters patent for so many of the said patent power looms, &c. (stating covenants by the plaintiff in pursuance of the above agreement): and for and in consideration of the grant and permission in the said indenture so given, &c., the defendants did thereby for themselves jointly and severally, and for their joint and several heirs, executors, &c., covenant, promise, and agree, to and with the plaintiff, his executors, &c., to pay the plaintiff, his executors, &c., the said sum of 2*l.* 2*s.* over and above the price of the said looms, and also a certain yearly payment for the same, &c., as by the said indenture, &c. Averment, that, although the term for and during which the sole use and benefit of the said invention, with power *to vend the same, was granted to the plaintiff by the said letters patent, is not yet expired, and although &c. (the declaration then averred that the defendants had availed themselves of the grant and permission covenanted for as above stated, and that the payments stipulated to be made by them had not ceased to accrue), and although the said plaintiff hath fulfilled all the covenants and agreements in the said indenture mentioned on his part to be performed; yet, &c. Breach, non-payment of the 2*l.* 2*s.*, &c., and non-fulfilment of other covenants.

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Pleas: First, that the letters patent in the said declaration and indenture mentioned were and are as follows. The letters patent were then set out, beginning with the following recital: "Whereas Robert Bowman of &c., hath by his petition humbly represented

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unto us that he hath invented improvements in the construction of looms for weaving various sorts of cloths, which looms may be set in motion by any adequate power; that he is the first and true inventor thereof; and that the same have never been practised by any other person or persons whomsoever to his knowledge or belief: the petitioner, therefore, most humbly prayed &c.; and we being willing" &c. Then followed the grant of the patent, to which were added these provisoes, among others, all of which were set out in the plea: "Provided always, and these our letters patent are and shall be upon this condition, that if at any time during the said term hereby granted, it shall be made appear to us, our heirs, &c., that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention as to the public use and exercise thereof in that said part of our United Kingdom, &c. (England, *Wales, and Berwick-upon-Tweed), or not invented and found out by the said Robert Bowman as aforesaid, then upon signification or declaration thereof, to be made by us, our heirs, &c., these our letters patent shall forwith cease, determine, and be utterly void," &c. There was also a proviso avoiding the patent if the said Robert Bowman should not particularly describe and ascertain the nature of his invention, and in what manner the same was performed, by writing under his hand and seal, and cause the same to be enrolled in Chancery within six calendar months next after the date of the patent. The plea then averred "that the said supposed invention in the said declaration and letters patent mentioned was not, nor is, a new invention." Secondly, the defendants pleaded, "that the said plaintiff was not, nor is, the first or true inventor of the said improvements in the construction of looms mentioned in the said indenture and in the said letters patent above set forth." Thirdly, they pleaded that the plaintiff did not within six calendar months, &c., or at any time, cause an instrument in writing, particularly describing and ascertaining the nature of his said invention in the said letters patent and indenture mentioned, and in what manner the same was performed, to be enrolled in Chancery as required by the letters patent; whereby the said letters patent became, and were

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at the time of the making of the indenture, void and determined.

The plaintiff demurred generally to each of these pleas, and the defendants joined in demurrer. There were also issues in fact.

Tomlinson, in support of the demurrers :

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The defendant is estopped from alleging the matter stated in *the pleas. He has admitted by the recital of his own indenture, as stated in the declaration, that the plaintiff invented the improvements for which the letters patent were granted. He cannot then deny, as he attempts to do by his first and second pleas, that the invention was new, or that the plaintiff was the first inventor. The recital, taking the word "invented" in the popular acceptance, is directly contradictory to the pleas, and means that he was the first inventor of a new invention. The parties executing the indenture must, from the nature of the transaction, have understood the word "invented" in that sense. It is evidently so used in the recital of the patent, as set out in the first plea; for that recital would otherwise be inconsistent with one of the provisoes. And if the sense now assigned by the plaintiff is that in which the parties to the indenture meant to use it, the estoppel is completely raised. On the matter of the third plea, no doubt can arise as to the recital in the indenture; for the words of the recital and plea are expressly contradictory to each other. Here then is an estoppel of the second class of the three enumerated in Co. Litt. 352 a, viz., "By matter in writing, as by deed indented;" instances of which are given in Com. Dig. Estoppel (A. 2). Nor can it be said here that the recital is of a generality, in which case the matter may be pleaded to, though not where the recital is specific, as is explained in Com. Dig. Estoppel (A. 2), and in the notes to *Rainsford v. Smith* (1). *Hayne v. Maltby* (2), which will be relied upon on the other side, is a case which perhaps would be differently determined if reconsidered now, when *the principles of law on this subject have been more clearly defined. At all events, it is distinguishable from the present case. There the articles of agreement did not recite that the invention was original, but merely

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(1) Dyer, 196 a.

(2) 3 T. R. 438.

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that the plaintiffs were the assignees of the patent; the case was argued on this ground for the defendant, and it was admitted that he might be estopped from denying what the deed did recite, viz., that the plaintiffs were in possession of a patent. On the other side, the case was compared to that of a tenant pleading *nil habuit in tenementis*. The Judges took different views of the subject; the judgments of Lord KENYON and ASHHURST, J. proceeded chiefly on the assumption of fraud, which was not borne out by the statements on the record. BULLER, J. referred the case wholly to the true principle, that of eviction, but applied it erroneously. He says, "I think that the case of landlord and tenant is not unlike this; for the facts in this case disclosed by the pleas are equivalent to an eviction of the tenant. As long as the tenant holds under the lease, he is estopped from denying his landlord's title; but when he is evicted, he has a right to shew that he does not enjoy that which was the consideration for his covenant to pay the rent." But, supposing that the plaintiff in that, or in the present case, had not been the original author of the invention, the defendant might nevertheless have continued in the full use and enjoyment of the privilege conveyed to him. To make the case equivalent to an eviction, it should have been shewn that the patent was repealed, or openly infringed. In the absence of such facts, the allegations of the defendant amounted to nothing more than a plea by a tenant of *nil habuit in tenementis*. That defence, coupled with the fact of eviction, is good, though not *so without it. GIBBS, Ch. J. says, in *Taylor v. Zamira* (1), "In every plea of eviction there is an averment that the lessor had not a perfect title when he demised, but that fact alone would not suffice; to constitute a plea, to it must be added the fact, that the lessee was in consequence evicted; the whole is a defence:" and the passage containing these words is cited and relied upon by PARKE, J. in *Pope v. Biggs* (2). The matter here pleaded amounts merely to an allegation that the plaintiff had not power to give the licence; there is no allegation of fraud, or want of enjoyment, or eviction either by recal or by open invasion

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(1) 16 R. R. 668, 670 (6 Taunt. 524, 527). (2) 32 R. R. 665 (9 B. & C. 256).

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of the patent. It is a common stipulation in contracts of this kind, that if the licensee be disturbed in his use of the patent, and the patentee, upon notice of such disturbance, omit to take legal measures against the wrong-doer, payment of the rent shall cease. The defendant here might have protected himself by such a clause if he had thought proper.

Wightman, contra :

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As to the general doctrine of estoppel, it is not to be collected with any certainty from the old cases that mere matter of recital does estop; for, in those cases (the pleadings of which are not fully stated), that which is said to be recital is so mixed up with the operative parts of the deed, that the estoppel may perhaps be referable to those parts rather than to the matter of recital. Estoppels are so called, according to Lord Coke, Co. Litt. 352 a, “because a man’s own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth;” and in *Palmer v. Ekins* (1) it was said and appears admitted, that “estoppels are odious, and not to be *construed or raised by implication.” And in Co. Litt. 352 b, among the rules laid down respecting estoppels are these—“Secondly, that every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference. Thirdly, every estoppel ought to be a precise affirmation of that which maketh the estoppel, and not to be spoken impersonally.” “Neither doth a recital conclude, because it is no direct affirmation.” Now the words relied upon in this case, to raise the estoppel, are, as stated in the declaration, “after reciting that the said plaintiff had invented certain improvements in the construction of looms for weaving.” These words clearly fall within the rules laid down by Lord Coke, and are insufficient to create an estoppel. Not only are they mere recital, but they do not precisely and with certainty affirm what the defendant now denies. The plaintiff is obliged to contend that the word “invented” implies that he was the first inventor, and of a new invention. But (as to the latter supposition) he might have invented the contrivance fifty years ago and suffered it to be used by so many persons

(1) 2 Ld. Ray. 1553.

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since, that the licence to use it now was of no benefit to the defendant; in that case the plaintiff would be the inventor, and yet the defendant would not be estopped from saying that the invention was not new. An estoppel, being *strictissimi juris*, will not be held to attach upon any statement which can by possibility be consistent with that of the deed.

(PATERSON, J. : It is consistent with these pleas that the circumstance of the invention not being new, or the plaintiff not being the first inventor, may have been confined to the knowledge of the defendant.

TAUNTON, J. : Why are we to presume, from the word **“invented,”* that the inventing was many years ago? Although this is a case of estoppel, the intention of the parties to the deed must be collected from all the circumstances, and the words construed according to their plain and primary signification. It would be better to say that there should be no estoppels than to adopt all sorts of artifices and stratagems to evade the law which allows them. If, as we are required to suppose, all the parties knew the plaintiff not to be the first inventor, would they have used the words which appear in this deed?)

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The question is what *may* be the case consistently with the deed, and what it is, strictly, that the defendant is estopped from denying. “Inventing” does not necessarily imply first inventing. Two may invent the same thing. And nothing is to be taken, in favour of an estoppel, by inference or argument. *Hayne v. Maltby* (1) is conclusive in favour of the defendant. It is said that the pleas here are like *nil habuit in tenementis*, pleaded by tenant against landlord, without shewing eviction. But the case between landlord and tenant is not like this; while the tenant has the enjoyment of the land, he has no right to say that the landlord has no title; he has the entire benefit of all that he bargained for. The defendant here has not that, if all the world has an equal right to use the invention. He bargained for the exclusive privilege, and he has it not if any one may interfere with him, although no one may have yet chosen to do so. There

(1) 3 T. R. 438.

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cannot, from the nature of the case, be an actual eviction, as there is of land. Two of the Judges in *Hayne v. Maltby* (1), expressly distinguish a case like the present *from that of landlord and tenant.

(LORD DENMAN, Ch. J. : This point may be as you put it, because in the case of a party licensed under a patent it is only the right that is conveyed.)

The moment it is found that the invention is not new, he is evicted; he may make the same machines, but it is no longer under the right which was conveyed to him.

Tomlinson, in reply :

According to the line of argument that has been taken, the pleas are no defence. If it be consistent with the word "invented" in the recital of the deed, that the invention took place fifty years before the granting of the patent, or that some other person had also invented the same thing, and the pleas only deny the inventing to the extent of either of those interpretations, then it is not shewn that the plaintiff had a bad title to the patent, or conveyed an imperfect one to the licensee. The invention might be old, but never yet brought into public use. Another person might have invented the same thing, but have never made it known before the plaintiff took out his patent. The pleas, therefore, upon this view of them, do not necessarily contradict the declaration. Either, then, the defendant is estopped by a specific recital, or his pleas are no answer to the action. It is said that the doctrine as to eviction does not apply, because the licence here is to enjoy the right: but, in the first place, the right is not necessarily impeached, as has just been shewn; and secondly, the lease here is not properly of a right, but of the benefit of using the invention; the profit of weaving cloth by these looms. A use of the same privilege by others, in open defiance of the licensee, would have been an eviction, according *to the judgment of GIBBS, Ch. J. before cited (2) :

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(1) 3 T. R. 441.

(2) In *Taylor v. Zamira*, 16 R. R. 670 (6 Taunt. 527).

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there would have been a want of right and a non-enjoyment. According to the argument for the defendant, the licensee pays for the right, not the enjoyment; and if he has not the right, is not bound to pay. But that is contrary to the opinions of the Judges in *Taylor v. Hare* (1). There the plaintiff, having hired the defendant's patent for a term, at 100*l.* a year, and used it for several years, discovered that another person had invented the same thing, and publicly used it in England, before the defendant obtained his patent. The plaintiff, therefore, brought an action for money had and received, to recover back the amount of his annual payments. But HEATH, J. observed, "It might as well be said, that if a man lease land, and the lessee pay rent, and afterwards be evicted, he shall recover back the rent, though he has taken the fruits of the land." And CHAMBRE, J. said, "Both parties have been mistaken; the defendant has thrown away his money in obtaining a patent for his own invention; not so the plaintiff, for he has had the use of another person's invention for his money."

(LORD DENMAN, Ch. J. : The subject was considered there so far as the purposes of that case required.)

The reasoning applies here. A monopoly in the use of the invention is what the licensee of a patent pays for. As to the *dictum* of Lord Coke (2), that a recital does not conclude, that can be only where the recital is of matter foreign to the contract; not where the matter recited is the foundation of the obligation, as it is here. Thus in *Corrant's* *case (3), in debt, the condition of the obligation was, "if the defendant should suffer the plaintiff to enjoy his right in such a land;" defendant pleaded that plaintiff had no right, and on demurrer it was held good; but it is added that if it had been "whereas the obligee had right," it would have been otherwise.

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LORD DENMAN, Ch. J., after stating the substance of the declaration and pleas, proceeded as follows :

The plaintiff contends that these pleas are bad, because the

- (1) 8 R. R. 797 (1 Bos. & P. (N. R.) 260). (2) Co. Litt. 352 b. (3) Dyer, 196 a, n. (41).

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defendant is estopped by his deed from pleading them. It is answered, as to the first plea, that it is not inconsistent with the deed; but we think it is so, and if not, that it is no defence. If by saying that the supposed invention is not new, it is only meant that it was discovered by the plaintiff fifty years ago, that is no reason that he should not now have taken out a patent for it. So as to the second plea, that the plaintiff was not the first or true inventor: that averment either denies that he invented the contrivance, or denies that he was the sole inventor. The answer is the same as that just given: in the one case the defendant states what he is estopped from alleging, because it contradicts the recital of his own deed; in the other, he gives no answer to the declaration. The third plea puts a fact in issue in direct contradiction to the recital of the deed. The doctrine of estoppel has been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal; but because *the estoppel may exclude the truth. However, it is right that the construction of that which is to create an estoppel should be very strict. As to the doctrine laid down in Co. Litt. 352 b, that a recital doth not conclude, because it is no direct affirmation, the authority of Lord Coke is a very great one; but still, if a party has by his deed recited a specific fact, though introduced by "whereas," it seems to me impossible to say that he shall not be bound by his own assertion so made under seal. This point was much considered in *Lainson*, executor of *Griffiths v. Tremere* (1). There could have been no case in which the Court would have been more strongly inclined to struggle against the doctrine of estoppel than that. The action was upon a bond. The condition, set out on *oyer*, recited that, by indenture of lease between the plaintiff's testator and the defendant, the testator demised premises to the defendant at the yearly rent of 170*l.*; and the condition was, payment to the testator of that sum. The defendant pleaded that the lease in the condition mentioned was a lease the *reddendum* of which was 140*l.* only, and that that sum had always been paid; to which the plaintiff replied that the

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(1) 40 R. R. 426 (1 Ad. & El. 792; 3 N. & M. 603).

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yearly sum of 170*l.* had not been paid. On demurrer it was held, that the defendant was estopped from pleading a lease at 140*l.*, which was in effect the same as saying that there was no lease at 170*l.* as mentioned in the bond. This was as strong a case as can be conceived ; and the averment creating the estoppel was introduced by way of recital : yet this Court, upon the greatest consideration of the cases ancient and modern, decided for the estoppel. I do *not think it necessary, in deciding the present case, to enter into a minute examination of the authorities ; they were fully considered on that occasion ; and I think the case of *Hayne v. Maltby* (1) has been sufficiently distinguished from that before us, in the course of the argument.

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TAUNTON, J. :

The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether there is a matter so asserted by the defendant under his hand and seal, that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital, but I do not see that a statement such as this is the less positive because it is introduced by a “whereas.” Then the defendant has pleaded that the supposed invention, in the declaration and letters patent mentioned, was not nor is a new invention. These words, “was not nor is a new invention,” must be understood in the same sense as the words “had invented,” in the recital of the deed set out in the declaration, and must refer to the time of granting the patent : and if the invention could not then be termed a new invention, it could not, I think, have been truly said in the deed that the plaintiff “had invented” the improvements, in the sense in which the deed uses the words. Then the plea directly negatives the deed, and comes within the rule that a party shall not deny what he has asserted by his solemn instrument *under hand and seal. As to the case of *Hayne v. Maltby* (1), I acknowledge, with unfeigned

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respect, that it does not become me to criticise the opinions of Judges so great and eminent as those who sat here when that case was decided ; but it is not necessary to examine into the grounds of the judgments there delivered, because I think *Mr. Tomlinson* has distinguished that case from the present. Here there is an express averment in the deed, that the plaintiff is the inventor of the improvements ; there the articles of agreement averred nothing as to the originality of the invention, but merely stated that the plaintiffs were the assignees of the patent, which they might have been, though the assignor was not the original inventor. And besides, though I do not rely much upon that, the Judges there differed in the reasons which they assigned for their judgments. It is sufficient, however, to say, without derogating from the authority of those learned Judges, that that case is very distinguishable from the present. I am of opinion that the demurrers here are well grounded, and the plaintiff entitled to judgment.

PATTESON, J. :

[*293] The third plea distinctly raises the question of estoppel ; the first and second not so directly. The declaration sets out a recital in the deed between these parties ; and it is necessary to consider the meaning of the words there used. It is said that in a case of estoppel nothing is to be taken by way of intendment. But before we come to the question of estoppel we must examine the construction of the deed. The words are, “that the plaintiff had invented certain improvements,” and had obtained his Majesty’s letters *patent for the sole use of the said invention. This recital can only mean that he had invented a new machinery, for which he had obtained the patent. If it meant that he was not the first inventor, it would be absurd. That being so, the pleas are, first, that the invention is not new ; secondly, that the plaintiff is not the first inventor. Then, if those assertions are used in the same sense as the words “ had invented ” in the deed, they contain a direct denial of the matter there recited ; if not used in the same sense, they are no answer to the declaration. The only authority cited for the proposition that no estoppel can be by recital is that from Co. Litt. 352 b. It is not denied, however,

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that there have been many cases in which matter of recital has been held to estop; but then it is said that the recital in those cases has been inseparably mixed with the operative parts of the deed. But, if that be a test, the case is so here. The deed recites that the plaintiff has invented improvements and obtained a patent for the invention, and then it proceeds to a demise of the very subject-matter for which the patent is so granted. I cannot separate these things, and I therefore think the recital here comes within the description which *Mr. Wightman* has given of the law laid down by the old cases. The passage in Lord Coke must be taken with some little qualification: and *Lainson v. Tremere* (1) is a direct authority to shew that there may be an estoppel by matter of recital. In *Hayne v. Maltby* (2) the recital contained no assertion of right in the plaintiffs except as assignees; and the plea did not deny that. The case was not properly one of estoppel. How far *the principle of eviction was applicable, it is not now material to consider. In *Oldham v. Langmead* (3) there cited, where the action was brought by the assignee of the patentee against the patentee, Lord KENYON would not allow the latter to shew that the invention was not a new one, against his own deed. As estoppels are mutual, that is a strong authority to shew that the assignee, if he had by deed admitted the invention to be new, would have been estopped from pleading the contrary. And the current of authorities, and particularly the late case of *Lainson v. Tremere* (1), shews that there may be an estoppel by recital in a deed. The plaintiff is entitled to judgment.

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WILLIAMS, J. :

I am of the same opinion. A passage has been cited from Lord Coke, in which he says that an estoppel must be certain, and not to be taken by argument or inference. But to give the words of this recital the sense ascribed to them by the plaintiff, is no argument; it is only making use of the common understanding of a phrase in the English language. When it is said, as in this deed, that a party "had invented" an improvement,

(1) 40 R. R. 426 (1 Ad. & El. 792;
3 N. & M. 603).

(2) 3 T. R. 438.

(3) 3 T. R. 439.

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it means that he was the inventor of it so as to make that invention available under the law of patents. The words "had invented" must, then, without any argument, mean that, the contrary of which is averred in the first and second pleas. The question, therefore, upon these, is the same as upon the third plea, as to which there is no doubt. Then the only question is, whether a recital, not being a direct assertion, can estop the party who has made it: no decision has been cited to the contrary; and this Court lately determined in *favour of such an estoppel in *Lainson v. Tremere* (1), where the doctrine of estoppels was carefully and fully considered, and where the estoppel in question depended as much upon a recital as that in the present case.

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Judgment for the plaintiff.

1834.
 Nov. 24.

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(2 Adol. & Ellis, 341—344; S. C. 4 N. & M. 315; 4 L. J. (N. S.) K. B. 53.)

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A clerk to a tradesman entered the transactions in trade, as they occurred, into a waste-book, from his own knowledge; and the tradesman copied the entries, day by day, into a ledger, in the presence of the clerk, who checked them as they were copied: Held, that the clerk, in an action brought by the tradesman for goods sold and delivered, might use the entries in the ledger to refresh his memory, although the waste-book was not produced, nor its absence accounted for, the entries in the ledger being in the nature of entries made by the clerk himself.

Per PATTESON, J., the rule that the best evidence must be produced precludes a witness from refreshing his memory with a copy of an instrument which might itself be used for refreshing his memory, as much as it precludes the admission in evidence of the copy of an instrument which would be evidence in itself.

ASSUMPSIT for goods sold and delivered. Plea, the general issue. On the trial before the secondary of the city of London, on the 31st of October, 1834, a clerk of the plaintiff was called to prove the order and sending out of the goods; and it was proposed, on the part of the plaintiff, that this witness should refresh his memory by the entries in a ledger which he produced. According to the statement of the witness, these entries had been copied by the plaintiff from a waste-book into the ledger:

(1) 40 R. R. 426 (1 Ad. & El. 792; 3 N. & M. 603).

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the waste-book was kept by the witness himself, and entries were made in the waste-book by him as the transactions occurred, from his own knowledge: the entries were regularly copied from thence into the ledger, day by day, by the plaintiff, in the presence of the witness, who checked them at the time of such copying, and ascertained their correctness. The waste-book itself not being produced, nor its absence accounted for, the defendant objected that the ledger was only a copy, and could not be used to refresh the witness's memory. The secondary allowed the objection; and, the witness being unable to recollect the transactions without the assistance of the entries, the plaintiff elected to be nonsuited. *Erle* obtained a rule in this Term (November 6th) to shew cause why the nonsuit should not be set aside, and a new trial had.

W. H. Watson now shewed cause:

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The witness could not look at this document. The absence of the waste-book was not accounted for: and the ledger was only a copy of the waste-book. In *Jones v. Stroud* (1) a witness had himself copied from a paper which he had originally made, while the facts were recent, six months before he made the copy; and he was not allowed to refresh his memory with the copy, although the original was stated to have become illegible. In *Doe d. Church v. Perkins* (2) a witness was not allowed to use extracts made by himself from a book, the entries in which were all made either by him or in his presence.

Erle, in support of the rule:

There can be no doubt that the witness might have referred to this paper, if he had made the entries in it himself, while the facts were fresh in his memory. But a memorandum made by another person, under the witness's eye, while the latter has the facts fresh in his memory, and has an opportunity of correcting the entry if erroneous, must fall under the same rule; for such a paper is not, properly speaking, a copy, but is in the nature of an original memorandum made by the witness himself, though

(1) 31 R. R. 660 (2 Car. & P. 196).

(2) 3 T. R. 749.

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not with his own hand, which last circumstance has never been held to be essential; this was decided in *Burrough v. Martin* (1). So in *Henry v. Lee* (2) a witness was allowed to look at a paper not written by himself. In *Rex v. Duchess of Kingston* (3) a witness was allowed, by the House of Lords, to use a copy of his own memorandum, made by another person in his *presence. And in *Tanner v. Taylor* (4), given from the notes of BULLER, J., in *Doe d. Church v. Perkins*, a witness, who produced a copy of a day-book, would have been allowed to use such copy, if it had been required merely for the purpose of refreshing his memory. *Doe d. Church v. Perkins* (5) itself is not in point; for there the witness said that, even after looking at the paper, he had no memory of his own as to the specific facts.

LORD DENMAN, Ch. J. :

We are agreed that the secondary was wrong in refusing this evidence. The paper, though called a copy, is not so; for when it was taken from that which is called the original, the witness checked it, and saw that it was correct. And as this was done when the transactions could not but be fresh in his memory, so that he must have been able to verify the correctness of the entry, he might afterwards look at the paper for the purpose of having the facts brought to his mind.

TAUNTON, J. :

The witness proved that these entries, like all the others, were shewn to him, and that he checked the entries himself. The entries so made by the master stand upon the same footing as if they had been made by the witness himself.

PATTESON, J. :

On the ground which has been just stated, I think this rule must be made absolute. It is clear that the witness might refresh his memory with this memorandum. But I feel much doubt as to the justness of another argument which has been

(1) 11 R. R. 679 (2 Camp. 112).

(2) 2 Chitty, 124.

(3) 20 Howell's State Trials, 619.

(4) 3 T. R. 754.

(5) 3 T. R. 749.

suggested in support of the rule. The copy of an entry, not made *by the witness contemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced; and that rule appears to me to be applicable, whether a paper be produced as evidence in itself, or used merely to refresh the memory.

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Rule absolute.

DONLAN v. BRETT (1).

(2 Adol. & Ellis, 344—347; S. C. 4 N. & M. 834; 4 L. J. (N. S.)
K. B. 55.)

1884.
Nov. 24.
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A cause, after being set down for trial, was referred by a Judge's order, with all matters in difference between plaintiff and defendant, to an arbitrator, the costs of the suit to abide the event of the award. The order of reference contained no power to order a verdict to be entered. The arbitrator awarded that a verdict should be entered for the plaintiff, for a sum named, and did not award that any sum was due or to be paid to the plaintiff by the defendant; and he further awarded, that, as to the matters in difference, nothing was due to either party. The order having been made a rule of Court, this Court refused to grant an attachment for not paying the sum named, and costs.

THIS cause, after being set down for trial, was, by a Judge's order, referred, together with all matters in difference between the plaintiff and defendant, to a barrister. The order did not contain any power to direct a verdict to be entered. The costs of the suit were to abide the event of the award, and the costs of the reference to be in the arbitrator's discretion. By his award he ordered a verdict to be entered for the plaintiff with 55*l.* damages; and he added, "I further award, order, and direct that in all the matters in difference between the parties brought before me, there is not any sum of money due to either of the said parties." The award did not find that any sum was due in the matter of the cause itself, nor order any sum to be paid as due in the cause. Each party was to pay his own costs of the reference. The submission was afterwards made a rule of Court. The Master taxed *the costs at 26*l.* 3*s.* 6*d.* In Trinity Term last, a rule *nisi* was obtained for an attachment

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(1) Followed in *Hayward v. Phillips* (1837) 6 Ad. & El. 119.—R. C.

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against the defendant for not paying the several sums of 55*l.* and 26*l.* 3*s.* 6*d.* In this Term (November 22),

Channell shewed cause (1) :

The award is not warranted by the submission. In *Cartwright v. Blackworth* (2), which is supposed to be an authority on the other side, a cause was referred before trial, with power to the arbitrator to determine what was due from the defendant to the plaintiff; the arbitrator ordered a verdict for a certain sum to be entered for the plaintiff, and that the defendant should pay the costs of the reference; and LITTLEDALE, J. granted a rule absolute for an attachment, saying, that the arbitrator, by directing a verdict to be entered for the sum, had done that which was tantamount to directing that sum to be paid by the defendant to the plaintiff. But the report of that case does not set out the terms of the award, on which much may depend.

(LORD DENMAN, Ch. J.: It must be assumed that there was no direction to pay the sum due, nor any finding that any sum was due, since the report mentions that there was a direction to pay the costs.)

If so, the decision is at variance with other authorities, and cannot be supported. In *Hutchinson v. Blackwell* (3) the Court held that a submission, after issue joined and before trial, by which the parties, reciting the cause, agreed "to leave the same, and the subject-matter thereof, and the issue therein, and the costs of such action," to the determination of an arbitrator, gave him no authority to order a verdict to be entered. That case came before the Court on a motion to enter *the verdict in pursuance of the award: and it might have been contended that the Court might refuse this, and yet support the award itself, or even grant an attachment for non-performance of an express order in the award; the judgment of the Court, however, as reported, seems to have proceeded upon the supposition that

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(1) Before Lord Denman, Ch. J.,
Taunton, Patteson, and Williams, JJ.

(2) 1 Dowl. P. C. 489.
(3) 8 Bing. 331.

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the award was bad. In *Jackson v. Clarke* (1) which was not mentioned in the argument in *Cartwright v. Blackworth* (2) an arbitrator, to whom a cause was referred before plea pleaded, awarded that a verdict should be entered for damages to an amount named; the Court refused an attachment for non-performance, and afterwards held that no action lay on the award. In *Edgell v. Dallimore* (3) the Court refused an attachment for non-payment of money, in a case where the award had only found the party to be indebted, and this on the ground that, as the award made no order to pay, the party could not have been guilty of a contempt by disobedience. If the arbitrator here had no power to enter a verdict, the cause is not put an end to; and this vitiates the award, for he was bound to put an end to the suit in some way, since the event of the award was to determine the costs of the suit.

Justice, contra :

This case cannot be distinguished from *Cartwright v. Blackworth* (2). In *Doe d. Williams v. Richardson* (4) the Court granted an attachment for non-performance of part of the order in the award, though the reference was confined to a cause then pending, and though the arbitrator, in awarding money to be paid to the plaintiff, did not award that he had any cause of action. In the present case there is a *direction to enter a verdict, which not only presupposes the sum to be due, but is virtually an order to pay. In *Jackson v. Clarke* (1) the only argument urged in support of the award was, that a part might be rejected; which was there impossible, as the award consisted of a single sentence: the interpretation now suggested was not offered there (5). In *Edgell v. Dallimore* (3), although the award found that the money was due, there was no order to pay: here the verdict has that effect. In *Hutchinson v. Blackwell* (6) the

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(1) McClel. & Y. 200; 13 Price, 208.

(2) 1 Dowl. P. C. 489.

(3) 3 Bing. 634.

(4) 21 R. B. 513 (8 Taunt. 697).

(5) In the argument as to the attachment, this interpretation was

suggested; 13 Price, 210: on shewing cause against the motion for a nonsuit, the point, if made, is less distinctly stated, the main argument being that mentioned in the text; McClel. & Y. 201.

(6) 8 Bing. 331.

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attempt was to give to the award the technical effect of a verdict. *The Highgate Archway Company v. Nash* (1) illustrates the present case.

(TAUNTON, J.: That case turned entirely on the attorney's claim for costs.)

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the Court :

In this case it was contended, in support of the rule, that an award that a verdict for a sum named should be entered for the plaintiff, is tantamount to an order that the defendant shall pay so much to the plaintiff. My brother LITLEDALE's decision in *Cartwright v. Blackworth* (2) is in favour of this view ; on the other side, a case in the Exchequer (3) was cited as being opposed to it. We have conferred with my brother LITLEDALE, and he agrees with us that the rule cannot be made absolute ; and he informs us that he should not have decided as he did in *Cartwright v. Blackworth* (2) if he had been aware of the case in the Exchequer.

Rule discharged.

1834.
Nov. 24.
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IN THE MATTER OF ARBITRATION BETWEEN J. MACKAY,
EXECUTOR, &C., J. U. WEST, AND W. A. WEST,
EXECUTORS, &C., T. HOLT, THE SAID J. U. WEST,
THE SAID W. A. WEST, AND THE SAID J. MACKAY.

(2 Adol. & Ellis, 356—360.)

A clause in a deed of submission to arbitration, "that no action or suit at law or in equity shall be commenced or prosecuted against the arbitrators concerning their award when made, nor to impeach the said award, unless some collusion or other fraud be discovered or appear therein," does not prevent a party to the deed from moving to set the award aside (for illegality upon the face of it), though no fraud or collusion appear.

Upon a reference of partnership disputes, a direction in the award that some of the parties to the reference pay a sum of money (which is

(1) 2 B. & Ald. 597.

(2) 1 Dowl. P. C. 489.

(3) *Jackson v. Clarke, McClell. & Y.*
200 ; 13 Price, 203.

one of the matters included in the submission) to the arbitrator, and that he apply the same to the payment of certain specified demands (also part of the matters submitted), is bad, and vitiates the award, although the payments appear by the tenor of the award to be for the benefit of the parties submitting, and not of the arbitrator.

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THE several parties to this arbitration had been partners in two trading establishments in the county of Lancaster, under the names of Mackay, West, & Co., and Thomas West & Co. By indenture, reciting that disputes had arisen among them respecting the partnership affairs, and a Chancery suit had been commenced, they agreed to refer their said differences, and the subject-matter of the suit, to Joseph King and Harwood Banner, accountants, with power to them to choose an umpire. The deed contained this clause: "And it is hereby further declared and agreed, that the present reference or submission shall or may be made a rule of his Majesty's Court of King's Bench at Westminster, on the application of any of the parties hereto, his or their heirs, &c.; and that no action or suit at law or in equity shall be commenced or prosecuted against the said *arbitrators and umpire, or any of them, concerning their or his award or determination after the same shall have been so made as aforesaid, nor to impeach the said award or umpirage, unless some collusion or other fraud be discovered or appear therein."

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The arbitrators, and an umpire chosen by them (a merchant), made their award concerning the several premises, and thereby adjudged, reciting the submission, among other things, as follows: "We find and award that there are due to the co-partnership of Mackay, West, & Co. from W. A. West and T. Holt, severally, as partners therein, the sums following (viz. 3,628*l.* from West, and 1,258*l.* from Holt): and we order and award that the said W. A. West and T. Holt do severally pay the respective sums of money so found due from them, with interest thereon from the date hereof at the rate of 4 per cent. per annum, into the hands of the said Joseph King (the arbitrator), at his office in, &c. aforesaid, on the 10th of October next, between twelve and one in the afternoon, to be applied in manner hereinafter directed." And they afterwards awarded and directed, "That the said J. King shall

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apply the said several sums of money so to be paid to him by the said W. A. West and T. Holt, according to our award aforesaid, in liquidation, so far as the same will extend, of the debts due by the said firm, and mentioned in the schedule hereunder written." There was annexed to the award a schedule of names of creditors, with sums opposite to their names, amounting in the whole to 6,562*l*. The arbitrators also awarded, in like manner, that certain sums (*viz.* 73*l*. and 99*l*.) were due to the firm of Thomas West & Co. from J. U. West and W. A. West respectively, and directed those parties to pay the said sums *to the said Joseph King (the arbitrator) at his office, between twelve and one on the 11th of October, to be applied as after mentioned. They further found, that certain sums (*viz.* 115*l*. and 57*l*.) were due from the last-mentioned partnership to Mackay and Holt respectively; and they directed that King should apply the sums to be paid by J. U. West and W. A. West, as last aforesaid, in satisfaction of the monies so found to be due to Mackay and Holt, "but subject to all equities between the said parties as partners in the said two several firms." The submission was made a rule of Court.

A rule was obtained in this Term, calling on all the parties to the submission, except W. A. West, to shew cause why the said award should not be set aside, upon several objections, which it is not necessary to state particularly; but the grounds of which were, that the award was uncertain, and not final, and that the arbitrators had exceeded their authority. The fifth objection was, that large sums of money were awarded to be paid to one of the arbitrators without any authority for that purpose in the submission, and without any security for his application of them. Mackay, Holt, and J. U. West made affidavits in opposition to the rule, stating, among other things, that they were satisfied with the award; and now

Sir J. Campbell, Attorney-General, Cresswell, and Tomlinson,
shewed cause:

In the first place, the present motion, even if well founded, is contrary to the agreement of the parties in the deed of

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submission. The substance of that agreement is, that the parties shall be finally bound by the award, unless fraud or collusion *be discovered. They are concluded by this award, in point of fact, as parties are, in point of law, upon reference to a barrister and award made by him. The Court will not, in either case, review the decision. No misconduct is charged. As to the fifth objection(1), if the suit had proceeded in Chancery, the court of equity would have appointed a receiver, and the arbitrators here have done no more. The money is not to be received by King for his own benefit. An award, that money be paid to a stranger, is good, where it appears to be for the benefit of the parties: Com. Dig. Arbitrament, E. 7; and this Court so decided in *Snook v. Hellyer* (2).

Sir James Scarlett and F. Pollock, contrà :

As to the precluding clause, it is one commonly introduced in submissions to arbitration, and cannot have the effect contended for. Supposing that parties could legally agree not to take advantage of the law to set aside a bad award, they cannot by such agreement take away the statutory jurisdiction of the Court over awards of this description. If one party to the submission procures the award to be set aside, contrary to his undertaking, the remedy for the others is by action. Till lately (3) a party might revoke his submission, though an action lay against him on the arbitration bond for so doing. As to the fifth objection, it is said that a court of equity would appoint a receiver; but that Court would, after such appointment, have jurisdiction over the receiver. No jurisdiction is retained in this case over the arbitrator who is to receive the *money; no security can be taken from him, and no attachment can issue against him if he omits to pay the money over. The arbitrators had no authority to order that he should apply the sums paid to him. The parties to this reference have no indemnity against the claims of the creditors for those sums which King is ordered to pay. And the payments by him to Mackay and Holt are to be "subject to all equities between the

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(1) The argument as to the other objections is omitted.

(2) 23 R. R. 741 (2 Chitty, 43).

(3) 3 & 4 Will. IV. c. 42, s. 39.

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said parties, as partners in the said two several firms;" which equities the award has left quite unsettled (1).

LORD DENMAN, Ch. J.:

The objection that payments are ordered to be made to an arbitrator over whom there can be no control afterwards, and that they are left in part subject to the equities which have been referred to, is fatal. The clause introduced in the arbitration bond to prevent impeaching the award, is confined to actions and suits, and does not apply to this mode of disputing it. Having, therefore, jurisdiction, and finding these defects in the award, we must order it to be set aside.

TAUNTON, J. concurred.

PATTESON, J.:

The objection that payment is ordered to be made to the arbitrator, extends to the whole award, and is fatal.

Rule absolute.

1834.
Nov. 25.

REX v. TRECOTHICK AND OTHERS.

(2 Adol. & Ellis, 405—409.)

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A local Act gave power to commissioners to raise money for paving, lighting, and watching a town, by rating and assessing the proprietors of houses according to the value at which the houses were taxed to the poor. It also empowered them to assess and levy a rate on certain proprietors for the purpose of certain improvements, such rate to be levied and assessed in the same manner as the other rates. In default of payment, a justice was authorized to issue a distress warrant. The Act also provided, that, in case any person thought himself aggrieved by any rate or assessment, he might appeal to the commissioners, who were authorized to give relief; and further, that any one who thought himself aggrieved by any thing done in pursuance of the Act, might appeal to the Quarter Sessions. The commissioners assessed a proprietor to a rate levied for the purpose of the improvements, at an annual value above that at which he was assessed to the poor:

Held, TAUNTON, J. *dissentiente*, that, on his refusing to pay, a justice might be required by *mandamus* to issue a distress warrant, the proprietor not having appealed.

F. POLLOCK, in this Term, obtained a rule, calling upon four of the keepers of the peace and justices of the Cinque Ports,

(1) This refers to a part of the argument not reported.

to shew cause why a *mandamus* should not issue, commanding them, or one of them, by warrant under their hand and seal, to direct Stephen Sackets Chancellor, the collector appointed by the commissioners for putting in execution stat. 53 Geo. III. c. lxxxii. (local and personal, public) "for more effectually paving, lighting, watching and improving the town of *Margate" (1), to levy on the goods and chattels of George Shew 2*l.* 10*s.*, being the amount of a rate made by the commissioners in pursuance of the said Act, for defraying the expenses of erecting a fence round Hawley Square pleasure-ground, in the town of Margate. The affidavits in support of the rule stated that,

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(1) Section 3 enables and requires the commissioners appointed by this Act, once in every year, to rate and assess the several sums of money after mentioned, upon the several tenants or occupiers of all houses, &c. according to the annual value, "such annual value to be from time to time settled and fixed according to the respective rents which such houses," &c. "are or shall be taxed at for the relief of the poor within the said town and parish," &c.

Section 8 enacts, "That it shall be lawful for" any justice of the town, &c. on refusal of payment, to grant a distress warrant.

Section 10 enacts, "That in case any person or persons shall think himself, herself, or themselves aggrieved by any rate or assessment which shall be made in pursuance of this Act, such person or persons may apply to the said commissioners, at any meeting to be holden within" &c.; "and the said commissioners are hereby authorized and empowered, if they shall think fit, to give to such person or persons aggrieved, such relief in the premises as to them shall seem reasonable."

Section 27 empowers the commissioners, for the purpose of erecting a fence to the pleasure-ground of Hawley Square, to borrow money, and, for repaying the same, to rate

certain proprietors of houses in the square; such rate to be levied, assessed, and recovered in such and the same manner as the other rates authorized to be raised by this Act: and, by sect. 28, the monies to be levied for the repairs and maintenance of the last-mentioned fence are to be paid by and recoverable from the said proprietors "rateably and in proportion to the annual value of such houses or buildings as is hereinbefore mentioned."

Section 40 enacts, That if any person shall think himself aggrieved by any thing done in pursuance of this Act, such person may appeal to the justices of the first General Sessions of the peace to be holden for the town and port of Dover, and the limits and precincts of the same, next after the expiration of one calendar month from the time such matter of appeal shall have arisen, first giving fourteen days notice of his appeal and the matter thereof to the treasurer or clerk to the commissioners; and the justices in such Session are "authorized and required to hear and determine the matter of such appeal, in a summary way, and to make such determination therein as they shall judge proper, and such determination shall be final, binding, and conclusive to all parties, and to all intents and purposes whatsoever."

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in July, 1824, *the commissioners, acting under the statute, erected the above fence, and borrowed a sum of money to defray the expenses; that on the 21st of August, 1833, they made a rate on the proprietors of the houses, &c., in the square, for the purpose of paying off that sum, and that George Shew, being such a proprietor, was rated and assessed at 2*l.* 10*s.*, which he refused to pay; that on the 14th of October last he appeared, on summons, before the defendants, and stated, that he refused payment because the commissioners had made a higher rate than the Act allowed: that the defendants were of that opinion, and that they refused to issue the warrant, and dismissed the summons. The affidavits in answer stated (besides other things not material to the present argument) that Shew was assessed to the poor at 15*l.* only, whereas the sum demanded of him was on an assessment of 25*l.*

Humfrey now shewed cause, and contended, first, that the rate was higher than the local Act allowed. (The objection on this point was over-ruled; no further reference to it is necessary.) A second objection is, that the magistrates have been mistaken in the assessment. The third section makes the assessment to the poor rate the test of annual value as to the rates for paving, lighting, and watching; and the twenty-seventh section enacts that the rates for the pleasure-ground shall be levied and assessed in the same manner as the other rates.

F. Pollock, contra, contended that if the party was rated on an improper assessment, that would have been matter of appeal under the tenth or fortieth section, and was no answer to this application.

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LORD DENMAN, Ch. J. :

The second objection made to this application is, that the party is improperly assessed. If he be, he should have appealed. If the magistrates were to abstain from issuing their warrant, on the ground that they considered the assessment improper, they would become a court of appeal from the Quarter Sessions. A party having suffered the assessment to be made without using

his remedy by appeal, is not afterwards to challenge it at this stage.

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TAUNTON, J. :

As to the second objection, I have great doubts. I thought it an answer to this application, that the party was assessed at 25*l.* instead of 15*l.* ; and that this Court ought not to carry into effect that which they saw to be erroneous. My LORD CHIEF JUSTICE says, that if the objection were allowed at this stage, the magistrates would be constituted judges of the propriety of the rate ; and upon this ground I am satisfied that at least the most proper method would be for the party to follow the course of appeal prescribed by the statute, which gives the commissioners an opportunity of rescinding their own act. At the same time it is hard that the commissioners are to be the judges of their own acts. And although they are so, and the party has lost his opportunity of appealing, I cannot go so far as to agree that we are to compel magistrates to do that which is illegal.

PATTESON, J. :

I think the party was bound to appeal to the commissioners, however hard the course may appear. And although this Court is always tender as to compelling magistrates to incur danger, yet here, where the objection is against a rate as to which an appeal is given, there would be no action against them, *and therefore there is no danger in enforcing this application. Were we to give effect to the objection, we should constitute the justices a court of appeal.

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WILLIAMS, J. :

If a party could reserve power to himself to shew cause against issuing the warrant to levy a rate on the ground now taken, it would open all those questions before the magistrates which the Legislature intended to be disposed of elsewhere.

Rule absolute.

1835.

Jan. 16.

[473]

CLANCY *v.* PIGGOTT.

(2 Adol. & Ellis, 473—482; S. C. 4 N. & M. 496; 4 L. J. (N. S.) K. B. 75.)

Declaration stated, that A. undertook to pay B. a sum due to him from C., if B. would give up a lien which he had upon C.'s goods; that B. gave up the lien, but A. did not pay. Plea, that the supposed promise was a special promise to answer for the debt of another person; that no agreement relating thereto, nor any memorandum or note thereof, stating the consideration, was in writing and signed by defendant or any person authorised by him, pursuant to the statute; and that the said supposed promise was contained in a memorandum in writing signed by defendant, which was as follows: "I agree to see you paid within three months the amount of 50*l.* due to you on account of C." Plaintiff demurred specially, on the grounds that the declaration stated a sufficient consideration for the promise, but the memorandum in the plea stated none; and that the plea, instead of denying the promise in the declaration, stated facts to raise a conclusion as to its not having been made; and that it did not confess and avoid, nor traverse; and that it was not necessary that the promise in the declaration should be written, &c.

Held, that the written agreement did not satisfy the Statute of Frauds; that the plaintiff, by his demurrer, admitted that agreement to be the contract between him and the defendant; and that he having so admitted, and the case being one in which, by statute, the whole contract ought to be set out in writing, the plaintiff could not assume that there were other terms, not embodied in the memorandum, which might have been proved at *Nisi Prius*.

ASSUMPSIT. The declaration stated that one George Moore was indebted to the plaintiff in the sum of 50*l.*; that plaintiff had in his possession goods of G. M. of the value of 20*l.*, as a pledge, and having a lien thereon for the said debt; and thereupon, to wit on &c., in consideration that plaintiff at defendant's request would give up the possession of the said goods and abandon his lien, defendant undertook and promised plaintiff to see *him paid the said sum of 50*l.* within three months from that time: averment, that plaintiff, confiding &c., gave up possession of the goods and abandoned his said lien, whereof defendant had notice: breach, that, although three months have elapsed, and although G. M. hath not paid the said 50*l.* to plaintiff, defendant hath not paid or seen plaintiff paid the said 50*l.*, and the same is still unpaid, &c.

Pleas. 1. *Non assumpsit*. 2. "That the supposed promise and undertaking was a special promise to answer for the debt and default of another person, to wit, the said G. M.: and that

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no agreement in respect of or relating to the said supposed promise or cause of action, or any memorandum or note thereof, wherein the consideration for the said special promise was stated or shewn, was in writing and signed by the said defendant, or by any other person by him thereunto lawfully authorised, according to the form of the statute in such case made and provided. And the said defendant further saith, that the said supposed undertaking and promise was and is contained in a certain memorandum in writing signed by the defendant, and which was and is as follows: (that is to say,) 'March 6th, 1832. Mr. Clancy, I hereby agree to see you paid, within three months from date hereof, the amount of 50*l.* due to you on account of Mr. George Moore, junior, Sheffield. J. W. Piggott.' " Verification.

Replication to the first plea, *similiter*. To the second, demurrer, assigning for causes that the plea is argumentative, "and not sufficiently direct and positive, inasmuch as a sufficient consideration for the said promise and undertaking is stated and set forth in the *declaration, but no consideration or promise whatever is stated in the said memorandum in the said second plea mentioned: and the plea, instead of such a statement, should have denied positively the making of the said promise and undertaking, instead of pleading facts from which the conclusion as to his having, or not having, made such promise and undertaking may be drawn:" also, that the plea neither confesses and avoids, nor traverses, &c.: and that there is no occasion that such a promise as that in the declaration mentioned should be in writing and signed, &c. according to the statute or otherwise; and it is not a promise or undertaking to answer for the debt and default of another person: and for that the said plea is, in other respects, &c. Joinder in demurrer.

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Austin, in support of the demurrer:

It is a well-known distinction, that where a promise of the kind now in question is merely collateral to, and in affirmance of, the undertaking of the party originally liable, it is within the Statute of Frauds, 29 Car. II. c. 3, s. 4; but not so where the promise is upon a new and distinct consideration. The cases on this subject are collected in note (5) to 1 Evans's Statutes, p. 212,

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8rd ed. In *Buckmyr v. Darnall* (1), *Rothery v. Curry* (2), *Jones v. Cooper* (3), *Matson v. Wharam* (4), and other similar cases, there was a mere naked promise by a person whom the law did not oblige to answer for the debt. But here a new consideration has arisen between the plaintiff and defendant. The promise is not to pay the original debt, *nor does that debt form any part of the consideration, although 50*l.* are mentioned, that is merely the description of what the defendant undertakes, by the new contract, to pay. The plaintiff having a lien on goods, the defendant engages, if he will abandon it, to pay him 50*l.* The distinction now taken was established in *Williams v. Leper* (5), and acted upon in *Bampton v. Paulin* (6), and *Edwards v. Kelly* (7). *Houlditch v. Milne* (8) is a case closely resembling the present.

(WILLIAMS, J. : That case has been commented on with some freedom in 1 Wms. Saund. 211 c (9).)

The comment is made on grounds not applicable here. *Castling v. Aubert* (10) is a similar case in principle. *Barrell v. Trussell* (11) and *Thomas v. Williams* (12), the latter case particularly, illustrate the present distinction. Then, if the promise stated in the declaration be not within the statute, the demurrer is supported, no answer being given by the plea.

Blackburne, contra :

The real question is, whether the plea furnishes an answer to the declaration. If the matter contained in the plea is an answer, it was necessary, by the new rules of pleading, that that answer should be set out ; it could not be taken advantage of under the general issue. Formerly, it would have been sufficient to plead the general issue, and to produce in evidence the agreement now relied upon, which would have shewn that the contract was within

(1) 2 Ld. Ray. 1085.

(2) Bull. N. P. 281.

(3) 1 Cowp. 227.

(4) 1 R. R. 429 (2 T. R. 80).

(5) 3 Burr. 1886 ; 2 Wils. 308.

(6) 4 Bing. 264.

(7) 18 R. R. 349 (6 M. & S. 204).

(8) 6 R. R. 815 (3 Esp. 86).

(9) Note (i) to *Forth v. Stanton* ; 5th ed. And see the same note, generally, as to the question above discussed.

(10) 2 East, 325.

(11) 4 Taunt. 117.

(12) 34 R. R. 535 (10 B. & C. 664).

the statute, and *would have defeated the action. But by the Rules, Hil. 4 Will. IV. tit. Pleadings in particular Actions, I. Assumpsit, s. 3: "In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law,"—"shall be specially pleaded. *Ex.gr.*: infancy—coverture—release—payment—performance—illegality of consideration, either by statute or common law," &c., "must be pleaded." The question, therefore, comes to this, whether the plea gives a sufficient answer; not whether the declaration, if unanswered, would be good; and, that being so, the cases which have been cited have no application. Now the plea says, that the promise and undertaking in the first count mentioned was a special promise to answer for the debt of another person; and that the said supposed undertaking and promise in the said first count mentioned was contained in a written memorandum, which is then set out. The effect of the plea is, that the promise declared upon is that so set out. The demurrer admits that fact; it therefore stands as if proved upon trial of the cause; and if the written agreement had been so proved, the opposite party could not have given evidence to shew that the real contract between the parties was a different one. This appears from *Saunders v. Wakefield* (1).

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(LORD DENMAN, Ch. J.: The mode of pleading introduced by the new rules does not make any difference as to the effect of what is put upon the record. But the question is, seeing upon the record the matter now placed there, whether there was or was not a valid agreement. It *is admitted by the demurrer that the memorandum set out was the agreement between the parties.)

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Then the plea is a complete answer to the action.

Austin, in reply:

It seems admitted on the part of the defendant, that the promise declared upon was a new and distinct undertaking by him; but it is now contended that a different agreement appears by the plea, and is admitted by the demurrer. The demurrer, however,

(1) 23 R. R. 409 (4 B. & Ald. 595).

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only admits that there was an agreement to the extent stated by the plea. The plea does not say that there was no further agreement or memorandum than that set forth.

(LITLEDALE, J.: It says that the promise in the first count mentioned was contained in a certain memorandum in writing, which is as follows, &c. What have we to do with any other ?)

The case, at any rate, stands only as if the agreement had been produced at Nisi Prius. Undoubtedly, if it had been so produced, evidence could not have been given to contradict it. But proof might have been offered of considerations not inconsistent with the writing. In *Saunders v. Wakefield* (1) the plea shewed that there was a special promise to pay the debt of a third person, and that there was no signed agreement stating the consideration in writing. There the plaintiff, in his replication, set out the written memorandum, and did not negative its being within the Statute of Frauds. Here the defendant, in his plea, sets out an agreement which, in itself, would be void by the statute, and he then argues that the plaintiff, by demurring, admits the contract of the parties to have been a contract within the statute. But, in fact, there is no such admission; for although there was some minute in writing made, as stated in the plea, the plaintiff may still insist that there was a consideration which is not disclosed by that writing, and which would take the case out of the statute by shewing that there was an agreement between the plaintiff and defendant, independent of that between the plaintiff and the third party, as stated in the declaration. It is said in 2 Starkie on Evidence, p. 573, 2nd ed., that where “the nature of the subject-matter does not require the agreement to be in writing, although a presumption arises, in the absence of proof to the contrary, that the parties expressed in writing the whole of their intention in respect of the subject-matter, and intended the written terms to operate as an agreement, yet that presumption may, it seems, be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a more general agreement, and was not intended to operate

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absolutely and unconditionally, or it may be shewn that a parol contract was made independently, wholly collateral to and distinct from a written one made at the same time. In such cases, the parol evidence is used not to vary the terms of the written instrument, but to shew that it is inoperative as an entire and independent agreement, or that it is collateral and irrelevant." And this agrees with the doctrine laid down in *Mildmay's* case (1), *Vernon's* case, 5th resolution (2), and the judgment of Lord HARDWICKE in *Peacock v. Monk* (3). It is, indeed, further said in Starkie on Evidence, vol. 2, p. 574, that "where a *statute requires the agreement to be in writing the case admits of a very different consideration;" but the plaintiff here denies that the case is within the statute.

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(LITLEDAL, J. : The agreement is, *primâ facie*, a promise to pay the debt of another and therefore within the statute.

LORD DENMAN, Ch. J. : The plea says, that the promise declared upon was contained in a memorandum in writing, which is as follows. Is not that, *primâ facie*, the whole undertaking? and should not you have replied that there was a further one?)

That was not necessary. The agreement, so far as the plea sets it out, is a promise to pay the debt of another; but we say that there is a consideration, not stated, which alters its nature. The plea ought to have shewn that there was no such consideration. As now framed, it is argumentative.

LORD DENMAN, Ch. J. :

I am of opinion that the defendant is entitled to judgment. *Saunders v. Wakefield* (4) is a case in point. The agreement there was set out in the replication, but I do not think the plaintiff in that case was more bound by having pleaded, than the plaintiff here by having admitted it. The plaintiff says that the defendant made a certain promise; the defendant pleads that the promise was in such and such terms: then the plaintiff, by his demurrer, admits that it was so. It is said, however, that

(1) 1 Co. Rep. 176 a.

(3) 1 Ves. Sen. 128.

(2) 4 Co. Rep. 3 a.

(4) 23 R. R. 409 (4 B. & Ald. 595).

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evidence might be given to add something to the contract: but it is granted that that would not be so if the case were one in which a statute required the whole contract to be in writing. *Primâ facie* this is a case in which *the Statute of Frauds would so require; and the plaintiff has not pleaded any thing to take the case out of the operation of the statute. The contract stands, therefore, as the defendant has represented it, and is void for want of consideration.

LITTLEDALE, J.:

There is no distinction between this case and *Saunders v. Wakefield* (1). The plea here, like the replication in that case, shews an agreement to pay the debt of another, without any consideration expressed in writing. It is said that the plea in this case should have averred that there was no further agreement; but I think enough is stated by the plea as it now stands. The agreement, as laid in the declaration, is to pay a sum due from another person; and, *primâ facie*, such a contract must be wholly in writing. It has, however, been held that that rule does not apply where the promise is made upon a new consideration, and it is said that the declaration here shews that to have been the case. But then the defendant by his plea alleges that the promise was a special promise to pay another's debt; the Statute of Frauds requires that such a promise, and likewise the consideration for it, should be in writing; and the plea states that no agreement in respect of this promise, nor any memorandum thereof stating the consideration, was in writing and signed by the defendant. If the plea stopped there it would give a sufficient answer; but it goes on to state that the said supposed promise was contained in a memorandum in writing, which it then sets forth, and in which no consideration is mentioned. It is said that the pleadings *do not shew that to be the only promise; but the averment, that the said supposed promise was contained in a memorandum in writing which was and is as follows, is as precise, and ties down the parties as much, as the usual mode of setting out a libel, or pleading a deed. Then the plaintiff, by his demurrer, admits that the agreement

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(1) 23 R. R. 409 (4 B. & Ald. 595).

was as it is pleaded; and as that agreement is identified with the contract in the declaration, and contains no statement of a consideration, the plea is a sufficient answer to the action.

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WILLIAMS, J.:

The plea here is like that in *Saunders v. Wakefield* (1), with the addition that, in this case, the plea itself sets out the written memorandum. If the plea would have been good without that addition, as was held in *Saunders v. Wakefield* (1), I cannot see how it should be vitiated by the memorandum being introduced. The plaintiff, by his demurrer, admits that it contains the precise terms of the agreement between the parties; and it is not disputed that, if that be so, the case falls within the statute. The defendant, therefore, is entitled to judgment.

Judgment for the defendant.

PEER v. HUMPHREY.

(2 Adol. & Ellis, 495—500; S. C. 4 N. & M. 430; 4 L. J. (N. S.)
K. B. 100.)

1835.
Jan. 16.
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Property feloniously taken from the plaintiff was sold by the felon to the defendant, who purchased *bonâ fide*, but not in market overt. The plaintiff gave notice of the felony to the defendant, who afterwards sold the property in market overt; after which the plaintiff prosecuted the felon to conviction: Held, that the plaintiff might recover from the defendant the value of the property in trover.

TROVER for three oxen. On the trial before Littledale, J., at the Northampton Spring Assizes, 1834, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

On the 24th of August, 1832, three oxen, the property of the plaintiff, were by his direction delivered to Roundthwaite, his servant, to drive to Northampton market. Roundthwaite, instead of taking them to Northampton, sold them to the defendant on the high road, but not in market overt, the same day, and absconded with the money. The defendant purchased *bonâ fide*. On the 26th of August, 1832, the plaintiff discovered that the cattle were in the defendant's possession, and on the same day

(1) 23 R. R. 409 (4 B. & Ald. 595).

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he gave the defendant notice that they belonged to him, the plaintiff, and had been feloniously stolen from him by Roundthwaite, as above mentioned. He at the same time demanded possession of the cattle, which was refused. The oxen remained in the defendant's possession till the 26th of November, 1832, when he sold them in market overt, received the price, and appropriated it to his own use. Roundthwaite was convicted of feloniously stealing the cattle, *on the prosecution of the plaintiff, at the Northampton Assizes in July, 1833, and received judgment of transportation for life.

If the Court should be of opinion that the plaintiff was entitled to recover the value of the oxen, the verdict was to stand; otherwise a nonsuit to be entered.

N. R. Clarke, for the plaintiff:

The oxen were not purchased in market overt. This is not like the case of *Horwood v. Smith* (1). There the defendant had actually bought the sheep in market overt, and sold them before the conviction of the thief. The purchaser in market overt obtained a title to the goods, which was indefeasible, unless the provisions of stat. 21 Hen. VIII. c. 11 (2), had been complied with. In that case, *BULLER, J.* points out that the property had been altered by a sale in market overt before the conviction of the felon, and that, after the time of the conviction (upon which the plaintiff's property commenced anew), the defendant had not had possession. But a sale not made in market overt does not alter the property; otherwise the whole law as to market overt would be superfluous. In *Parker v. Patrick* (3) it was held that the owner of goods which had been obtained from him by fraud and pawned, could not, after he had convicted the pawner of the fraud, and obtained the possession again, detain them against the pawnee: but, in that case, the Court expressly distinguished between fraud and felony.

(1) 1 R. R. 613 (2 T. R. 750).

(2) Repealed by stat. 7 & 8 Geo. IV. c. 27, s. 1. The stat. 7 & 8 Geo. IV. c. 29, s. 57, substituted other enactments as to restitution, and extended them to the case of goods fraudulently obtained. [The Act of 7 & 8 Geo. IV. c. 29, was

again repealed by 24 & 25 Vict. c. 95; and substantially re-enacted by the Larceny Act, 1861 (24 & 25 Vict. c. 96), now modified by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 24).—R. C.]

(3) 5 T. R. 175.

Amos, for the defendant :

No argument can be suggested on behalf of the plaintiff, which might not equally have been urged in *Horwood v. Smith* (1). The original owner of the goods, and the present defendant, are equally innocent; therefore the maxim applies, *in æquali jure potior est conditio possidentis*. Indeed the owner may be said to be the person who has misplaced a trust; whereas no blame could attach to the defendant till the conviction of the felon: before which time he had parted with the goods. Lord KENYON'S judgment in *Horwood v. Smith* (2) does not notice the fact of the sale having taken place in market overt; and it may, therefore, be assumed that his decision would have been the same, whatever the nature of the sale had been.

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(LORD DENMAN, Ch. J. : The expression reported in that judgment, that "during the interval between the felony and the conviction, the property remains *in dubio*," seems incorrect. Is it ever *in dubio* ?)

It may be so considered, on the score of public policy, which requires that the party injured should prosecute. In *Gimson v. Woodfall* (3) it was held that an owner of a stolen horse could not recover against the party who had bought the horse of the thief, if such owner had reason to believe that the seller had stolen it, and had taken no steps towards prosecution. In 1 Hale's Pleas of the Crown, c. 47, p. 538, it is said that there are three methods of obtaining restitution; by appeal of robbery or larceny, by the statute of 21 Hen. VIII. c. 11, and by common law: and afterwards, p. 546, "A. steals the goods of B. viz. fifty pounds in money, A. is convicted, and hath his clergy upon the prosecution of B. B. brings a *trover and conversion for this fifty pounds, and upon not guilty pleaded this special matter is found, and adjudged for the plaintiff, because now the party hath prosecuted the law against him, and no mischief to the common wealth; but it was held, that if a man feloniously steal goods, and before prosecution by indictment the party robbed brings trover, it lies not, for so felonies should be

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(1) 1 R. R. 613 (2 T. R. 750).

(3) 2 C. & P. 41.

(2) 1 R. R. 613 (2 T. R. 755).

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healed." In the case of an appeal of felony, if any goods were not mentioned, they were confiscated to the King; Hawkins, P. C., book 2, c. 23, s. 57; the principle of this was, that the law required public justice to be enforced as to all the goods.

(LORD DENMAN, Ch. J.: The reason seems also to be, that the law presumed the appellant to have no title to the goods which he did not claim. The King might take them, as property without an owner.)

Parker v. Patrick (1) is in favour of the defendant: a person has as much power to pass property in goods which he has obtained by felony as in goods which he has obtained by fraud.

LORD DENMAN, Ch. J.:

In *Davis v. The Bank of England* (2) it was held that no property in stock passed by a transfer made under a forged power of attorney; and that the original owner, though he had not prosecuted, was entitled to recover his dividends from the Bank. Here the plaintiff has actually prosecuted the felon to conviction. It is quite clear that no property ever passed to the defendant, or from the plaintiff. One difficulty, indeed, arises from Lord KENYON's expression in *Horwood v. Smith* (3), that "the property remains *in dubio*." I think that either the expression was a hasty one, or it has been reported by mistake. A sale in market overt clearly *gives a *primâ facie* title to the purchaser. Another difficulty arises from the case of *Parker v. Patrick* (4). There, indeed, the Court distinguished between fraud and felony: but in the argument for the present defendant it is denied that such distinction can be taken; if so, the decision in that case was incorrect. And if the question of goods fraudulently obtained were before us, I cannot help thinking that the case of *Parker v. Patrick* (5) would not bear examination. *The Earl of Bristol v. Wilsmore* (6) seems to me to be quite inconsistent with it.

(1) 5 T. R. 175.

(2) 27 R. R. 667 (2 Bing. 393).

(3) 1 R. R. 613 (2 T. R. 755).

(4) 5 T. R. 175.

(5) The distinction taken in *Parker v. Patrick* was grounded on the

statute 21 Hen. VIII. c. 11. It would seem, therefore, that since the statutes 7 & 8 Geo. IV. c. 27 and c. 29 (see p. 472, n. (2), *ante*), that case can no longer be an authority.

(6) 25 R. R. 488 (1 B. & C. 514).

LITLEDALE, J. :

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I also am clearly of opinion that the plaintiff must recover. The seller had no power to sell: the *prima facie* right is therefore in the plaintiff. But the law is, that no action shall be brought, under particular circumstances, until the owner has done his duty by prosecuting (1). Even that has been done here. In *Gimson v. Woodfall* (2) the property must have been changed by a sale in market overt: besides, in that case, the party robbed had done nothing towards bringing the thief to justice; here he has actually prosecuted him to conviction.

WILLIAMS, J. :

That a party obtains a right to property by purchasing it in market overt, is a rule as old as the law itself. The property had so passed in *Horwood v. Smith* (3), and it could not be in two parties at the same time. It had been parted with a second *time before the conviction took place, which conviction was the only means of divesting it. Here there was no legal sale at all; the property, therefore, was still in the plaintiff; and any argument drawn from considerations of public justice is met by the fact that the prosecution has actually taken place.

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Judgment for the plaintiff.

GOSBELL v. ARCHER.

1835.
Jan. 16.

(2 Adol. & Ellis, 500—513; S. C. 4 N. & M. 485; 4 L. J. (N. S.) K. B. 78.)

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Lands of the defendant were put up by him to auction; one condition of the sale was, that the purchaser should pay a deposit and half the auction duty. The plaintiff purchased and paid as above. He signed a written memorandum of the contract, which J. N., the auctioneer's clerk, also signed as follows: "Witness J. N." J. N. received the above sums for M., the auctioneer, and signed the receipt (being authorised by M. to do so), as follows: "For Mr. M. — J. N." Money was afterwards paid over by the auctioneer, on the purchase, to B., the defendant's attorney, as his agent. The defendant not being able to make out his title, B., as his agent, wrote a letter to the plaintiff's attorney, naming the plaintiff and defendant, saying that he could not make out the title to "this property as freehold," advising the plaintiff

(1) This *dictum* is corrected in *Lee v. Baynes* (1856) 18 C. B. 599, per CROWDER, J., p. 602.—R. C.

(2) 2 C. & P. 41.

(3) 1 R. R. 613 (2 T. R. 750).

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“to relinquish his purchase,” and referring to the “charges” to be made by the plaintiff’s attorney :

Held, that J. N. did not sign the memorandum as agent to defendant; that neither his agency nor the contract were recognised by the receipt of the money or B.’s letter; that here was, consequently, no proof of a contract to make a title on which defendant could be charged under s. 4 of the Statute of Frauds; and, therefore, that, although plaintiff might recover the deposit (1) and moiety of auction duty as money had and received, he could not recover interest thereon, nor his expenses of investigating the title.

[*501] THIS was a special case, in substance as follows : Assumpsit. The plaintiff declared specially on the conditions of a sale by auction of the moiety of an estate, sold by Mills, an auctioneer, to the plaintiff; and claimed to recover the amount of the deposit paid, and a moiety of the auction duty, with interest, and the expenses of investigating a title, which was found not *to correspond with the representation in the proposals of sale. The declaration also contained counts for money lent, money paid, and money had and received, for interest, and on an account stated. Plea, the general issue.

On the trial before Denman, Ch. J., at Guildhall, in February, 1894, a verdict was found for the plaintiff for 85*l.* 16*s.* 8*d.* (being the amount of the deposit and a moiety of the auction duty), on the count for money had and received; and for the defendant on the special count, subject to an application to be made to increase the damages as after-mentioned.

In the following Easter Term, *Sir James Scarlett* obtained a rule to shew cause why the damages should not be increased by adding 30*l.* 11*s.* 2*d.* for the plaintiff’s costs of investigating the vendor’s title and endeavouring to get the purchase completed, or such other sum as the Master on taxation should find to be due; and 6*l.* 19*s.* 8*d.* for interest on the sums paid as deposit and for auction duty; with leave to the parties to state a case for the opinion of the Court.

The defendant was mortgagee of the property. The printed particulars and conditions of sale stated that the property was “to be sold by auction by Mr. Mills, by direction of the

(1) Followed on this point : *Cusson v. Roberts* (1862) 31 Beav. 613; 32 L. J. Ch. 105. The latter case was questioned in *Thomas v. Brown* (1876) 1 Q. B. D. 714.—F. P.

mortgagee, in lots ;” that descriptive particulars might be had of Messrs. R. and M. Browne, solicitors, at the Mart, and at Mr. Mills’s office ; and that the sale was to be subject to the usual conditions, and to the following: viz. “That the highest bidder shall be the purchaser, and that a moiety of the auction duty is to be paid by the purchaser ; that every purchaser shall immediately pay down a deposit, in the proportion of 20*l.* for every 100*l.* of his purchase *money, into the hands of the auctioneer, and sign an agreement for payment of the remainder to the vendors on or before the 29th of September next, at which time the purchases shall be completed, and the respective purchasers are then to have the actual possession of their respective lots, subject to the respective leases mentioned in the particulars hereto annexed ; that, within twenty-one days of the day of sale, the vendors shall, at their own expense, prepare and deliver an abstract of their title to each purchaser, and shall deduce a good title to the lots sold, but no purchaser shall be entitled to call for or require any evidence of title further back than the will of” &c. (Certain objections were also precluded.) The said particulars and conditions were indorsed with the name of the auctioneer, thus: “Mills, auctioneer and estate agent, St. Mildred’s Court, Poultry.”

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The plaintiff, at the sale, was declared the purchaser of lot 2, described in the particulars, for 400*l.* ; and he paid, at different times, the deposit of 20*l.* per cent. on the purchase money, and a moiety of the auction duty ; and receipts were given for the same, in the following form :

“80*l.*

“AUCTION MART, 29th of August, 1832.

“Received of Mr. Henry Gosbell eighty pounds in part payment of deposit and one half duty, on property purchased by him this day, as per agreement.

“For Mr. Mills. JOSEPH NEWMAN.”

Joseph Newman, who signed the receipts for Mills, was his managing clerk, and had due authority from him to give such receipts.

The plaintiff also signed an agreement, which was *printed

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and written on the back of the aforesaid particulars and conditions of sale, and of which the following is a copy :

“ AUCTION MART, 29th August, 1832.

“ Lot 2. I hereby acknowledge that I have this day become the purchaser of the property mentioned in the within particular, at the sum of 400*l.*, and have paid into the hands of Mr. John Mills 80*l.* as a deposit and in part payment of the said purchase money, and also 5*l.* 16*s.* 8*d.*, being one moiety of the auction duty ; and I do hereby agree to pay the vendors the remaining sum of 320*l.* on the 29th of September next, and in all respects to fulfil on my part the within conditions of sale.

“ H. GOSBELL.

“ Witness, JOSEPH NEWMAN.”

Joseph Newman, who witnessed the execution of this agreement, was the auctioneer's clerk before mentioned.

The defendant was the person by whose authority the property was put up to sale, and was the intended vendor thereof. A sum of money was paid by the auctioneer to Messrs. Browne, as agents for the defendant, and as part of the deposit.

After the auction, the following letter was written by Messrs. Browne, as the attorneys for the vendor, to the attorney for the plaintiff :

“ *Archer and others v. Gosbell.*

“ SIR,—We had better admit that we cannot make out our title to this property as freehold, so as to render it marketable ; and if, therefore, your client will not take it as it appears on the abstract, the better way will be for him to relinquish his purchase, and we presume *we must pay your charges, which we trust will not be much, and you can then return us our abstract.

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“ We wish for your client's immediate determination, as we mean finally to settle this long-standing affair.

“ We are, &c.,

“ R. and M. BROWNE (1).

“ 3rd July, 1833.”

No sufficient title has ever yet been made to the plaintiff.

(1) In the course of the argument it was agreed by counsel that this should be considered as the letter of the defendant's agent.

The plaintiff's right to recover the sum of 85*l.* 16*s.* 8*d.* on the count for money had and received was not disputed.

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The question for the opinion of the Court was stated to be, whether the plaintiff was or was not entitled to recover the said sums of 80*l.* 11*s.* 2*d.* and 6*l.* 19*s.* 8*d.* mentioned in the said rule of Court of Saturday the 19th of April, 1834, or either of them, and how the verdict was to be entered between the parties in respect of the said two last-mentioned sums.

Sir F. Pollock, Attorney-General, for the plaintiff :

The plaintiff is entitled to the deposit, upon the authority of *Wilde v. Fort* (1) ; and no doubt can now be entertained that he is also entitled to recover the expenses and the interest, if there has been a contract. It will be objected, that there has been no signature to a written contract, except by the purchaser. It is true that if, upon a sale by auction, the purchaser signs, and the auctioneer's clerk also signs, and nothing more *is done, there is no contract upon which the purchaser can recover ; but if the vendor ratify the signature of the clerk, this is as binding as if the auctioneer or the vendor himself had signed. The authorities on this point are collected in Sugden's Vendor and Purchaser, ch. 3, s. 2, ii. iii. (2). In *Coles v. Trecothick* (3) a signature as a witness by a duly authorised clerk of an auctioneer was held to be sufficient : therefore, if the signature of the clerk in the present case has been recognised by the principal, there is a signature by an agent : *Maclean v. Dunn* (4), *Soames v. Spencer* (5). Here the vendor is admitted to have received the money, otherwise the plaintiff could have recovered nothing, and such receipt is a recognition.

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(LORD DENMAN, Ch. J. : It is said in Starkie on Evidence (6), that " The clerk of an agent has not, in general, authority to sign for the principal, although it may be sufficient in particular cases where the principal has assented."

LITLEDALE, J. : Would you say the signature as a witness was

(1) 13 R. R. 616 (4 Taunt. 334).

(4) 29 R. R. 714 (4 Bing. 722).

(2) Vol. i. pp. 99, 103, 9th ed.

(5) 24 R. R. 631 (1 Dowl. & Ry. 32).

(3) 7 R. R. 167 (9 Ves. 234).

(6) Vol. ii. p. 352, 2nd ed.

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enough, if it appeared that the clerk had merely been called in to attest, without having heard any thing as to the contract?)

In this case, the clerk must have been cognisant of the contents. But, again, the letter of Messrs. Browne is also a recognition of the contract. It is suggested that the plaintiff shall "relinquish his purchase;" the fact of the purchase is therefore recognised, independently of the clerk's signature.

Thesiger, contra:

[*506] The facts in *Coles v. Trecothick* (1) were very different from those in the present case. The *master of the clerk there told the principal that he was in the habit of allowing the clerk, who signed, to transact business for him, and the principal acquiesced in his so doing. As to the ratification here, which is admitted to be necessary, part payment is insufficient under 29 Car. II. c. 3, s. 4; under s. 17 it is made sufficient by express words. Here, too, the money is received, not by the principal, but by the attorneys. If that were a sufficient recognition, there never could be any difficulty or question as to the effect of the clerk's signature, for the clerk always does pay over the deposit to the auctioneer. Then, as to the letter of Messrs. Browne, a party cannot, under the Statute of Frauds, pray in aid parol evidence to explain the terms of a written contract, although parol evidence may be given to shew the fact of a particular person having authority. In *Boydell v. Drummond* (2) a signature of a name was held to be inapplicable to a distinct written instrument, not referred to in the paper on which the name was signed; and it was said that the two could not be connected by parol evidence. Now here, without parol evidence, the letter cannot be connected with the property; and it is impossible to construe this letter into a recognition of the clerk's authority as agent; it is the letter of an agent only.

(LITTLEDALE, J.: Here are agents of two sorts, one the attorney, the other the auctioneer's clerk; the plaintiff proposes to set up the authority of one agent by the act of the other.)

(1) 7 R. R. 167 (9 Ves. 234).

(2) 10 R. R. 450 (11 East, 142).

Sir F. Pollock, in reply:

The argument, that the receipt of money by the auctioneer is insufficient, is *fallacious: for, according to that doctrine, a receipt of money by the banker of the principal would be insufficient. The payment to Messrs. Browne was a payment to the defendant; the case states that it was paid to them "as agents for the defendant." In *Boydell v. Drummond* (1) the signed paper referred to nothing; in the letter of Messrs. Browne, both parties are named; it speaks of "this property as freehold," and the "purchase" and the "charges" of the plaintiff's attorney are referred to. There is no objection, in a case like the present, to connecting two written documents by parol evidence.

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LORD DENMAN, Ch. J.:

In order to see whether the plaintiff be entitled to recover the sum which he now claims, it is necessary to ascertain whether he can resort to any agreement conformable to the fourth section of the Statute of Frauds. The words of that section are: "Unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." It is quite evident that, here, no such writing was signed by the party, or any person previously authorised by him. But it is said that the subsequent acts, on the part of the principal, amount to a recognition, and ratify the agency. Certainly it appears from *Maclean v. Dunn* (2) that a subsequent recognition is enough. The question is, whether there be here such a recognition. No doubt I should require the most decisive authority to shew that such a signature as we have here could be binding, except in the *character of witness. Lord

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(1) 10 R. R. 450 (11 East, 142). (3) In *Coles v. Trecothick*, 7 R. R. 167 (9 Ves. 251).
(2) 29 R. R. 714 (4 Bing. 722).

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no such decision has been actually made; and, if it had, I should pause, unless I found it sanctioned by the very highest authority, before I held that a party attesting was bound by the instrument. Suppose, however, that a party could be bound by a signature in the character of a witness, is there here any proof of authority? With respect to the letter, it is quite possible that the parties writing it were totally ignorant of the particulars of the contract. They might know that there was some contract; but, if that were held to bind as a recognition of all the particulars of the actual contract, it would be letting in all the abuses which the statute was passed to prevent. And this letter is no ratification, but an abandonment.

LITLEDALE, J.:

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I am of the same opinion. The *Attorney-General* asks how the deposit could be recoverable, if there were no contract? There is a great distinction between the deposit and the expenses; the deposit gets into the hands of the defendant, or his agents, and the party receiving it does not apply it to the purpose for which it was paid. That is money had and received to the use of the party paying; and the agent, when he disclaims the application, acknowledges it to be so received, and is bound to return it. But, in order *to recover the expenses, the plaintiff must shew that the defendant had entered into a valid contract, undertaking to make out a title. It is proposed to prove the agency, in the first place, by the signature of the clerk to the auctioneer. He gives a receipt for the auctioneer; the case states that the clerk had authority to give receipts, and he must be so authorised in the natural course of things. There is a sufficient signature to the acknowledgment of August 29th, so far as the purchaser is concerned. And then it is contended that the clerk, by signing this, though only as a witness, supplies, if he can be shewn to be an agent, the signature required by the Act. I do not find this laid down by Lord ELDON. He does indeed say (1), “Where a party, or principal, or person to be bound, signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal.” But see what

(1) In *Coles v. Trecothick*, 7 R. R. 167 (9 Ves. 251).

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the signature was in that case: "Witness Evan Phillips for Mr. Smith, agent for the seller." That assumes quite a different appearance from the signature in the present case, where Newman simply signs as witness. Such a signature does not fall within Lord ELDON's rule. Then it is said that the letter of Messrs. Browne is a ratification. What does it ratify? It cannot ratify Newman's signature as agent for the principal, for he did not sign as such agent at all. The letter of Messrs. Browne, inasmuch as it refers to the abstract, although requiring parol evidence, might possibly be enough, if it ratified the contract; but it is not a ratification, it is an abandonment. This does not prove that what had been before done was a satisfaction of the requisites of the Statute of Frauds.

WILLIAMS, J.:

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I am of the same opinion. The question is, whether this was a signature by an agent duly authorised. The *Attorney-General* argues, that the signature by the clerk as witness would be sufficient, on the supposition, that he was cognisant of the contents. It does not appear from any thing on the face of the document, that he had such knowledge; and to let in parol proof of such knowledge, would be just the mischief which the statute was meant to obviate. The receipt of the money comes to nothing; it is merely the ordinary course of receiving money at a sale. Then the only remaining question is, as to Messrs. Browne's letter, but I cannot infer from the letter, that, up to that time, every preceding step required by the Statute of Frauds had been complied with? It appears to me a great strain to say that the signature by another person's clerk is a signature by an authorised agent of the defendant, and that when he signs, not as agent, but as witness. Unless there be something to shew that he is termed a witness merely by a mistake, it cannot be said that he signed as agent.

Rule, as follows:

"It is ordered, that a verdict be entered for the plaintiff on the count" [not counts] "for money had and received, and money paid; and for the defendant on all the other counts."

1835.
Jan. 24.

REX v. THE INHABITANTS OF FOLESHILL.

(2 Adol. & Ellis, 593—599; S. C. 4 N. & M. 360; 4 L. J. (N. S.) M. C. 63.)

[593]

A stratum of coal lay in parishes A. and B., and was worked in both, but all the coal was brought to the surface by a shaft in A. : Held, that in a rate upon the proprietor for a coal-mine, engines, and machinery in A., he could not be assessed in respect of the coal gotten from the part of the stratum in B.

On appeal against a poor-rate for the parish of Foleshill in the county of the city of Coventry, by which George Wheilden was assessed in the sum of 525*l.* for a coal-mine, engines, and machinery in his occupation in that parish, the Sessions reduced his rate to 320*l.*, subject to the opinion of this Court on the following case :

Mr. Wheilden is the owner and occupier of a coal-mine, situate partly in the parish of Foleshill, and partly in the adjoining parish of Exhall. At the time when the rate was made, he was getting coal partly from that part of the mine the surface of which is in Foleshill, and partly from that of which the surface is in Exhall. The pits, engines, and all the fixed machinery for working the whole of the mine, and by which the same is made available, are in Foleshill alone, in which parish all the coal which is taken from the whole mine is brought to the surface of the earth. Wheilden is assessed in Exhall at 210*l.* for that part of the mine of which the surface is in Exhall. The Sessions found that, if the parish officers of Foleshill were entitled to rate Wheilden in that parish for the whole profits of his mine, 525*l.* was a proper sum ; but that, if they were only entitled to rate him for the profit derived from the steam-engines and other machinery, and for the coal gotten from that part of the mine the surface of which is in Foleshill, the assessment ought to be reduced to 320*l.*

[594]

The question for this Court was, on which of the two principles the rate was to be made.

Hill and Waddington, in support of the order of Sessions :

The proprietor must be rated for his coals in the parish where they are naturally found. This is the plain meaning of the statute 43 Eliz. c. 2, s. 1, which directs the overseers of every

parish to tax every occupier of coal-mines in the said parish. The mine, in this case, is partly worked in Exhall: how, then, can it be said that the proprietor is not the occupier of a mine in Exhall? and why is the rate to be laid, not where the coal is worked, but where it is brought to the pit's mouth? If this were so, it would be in the choice of a person occupying mines in several parishes to determine in which parish he should be rated for the whole of that property. The land used in a parish ought to contribute to its burdens: and there is more reason for rating mines in the parish where they lie, than other property, because the working exhausts and takes away the value of the land. A principle something like that contended for on the other side was adopted when canals were rated at the termini; but the rule now prevailing is a different and more reasonable one. This case bears a strong analogy to *Rex v. The Corporation of Bath* (1), where the corporation had reservoirs in a parish without the city, for collecting water from certain springs, which water they distributed by aqueducts and underground pipes through that parish, and into others within the city. It was contended, there, that the corporation were rateable in that parish where *the reservoirs lay, for the whole profits of the water; but the Court held otherwise, deciding, however, that the corporation were rateable there for the reservoirs within that parish. Lord ELLENBOROUGH says, in his judgment, "It should seem to follow as a consequence from what has been said already, that if the corporation of Bath be occupiers of any local visible property, producing profit in any other parish, and falling by reasonable construction within the same description of property as the reservoirs already mentioned, they should be liable in like manner to be rated for it, *pro tanto*, in such other parish." That applies to the present case. The principle recognised in *Rex v. The Corporation of Bath* (1) has been acted upon in *Rex v. The Brighton Gas Light Company* (2) and many similar cases.

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[*595]

(WILLIAMS, J.: The rating of tubes and pipes, as a subject of profitable occupation in a parish, though they conveyed

(1) 13 R. R. 333 (14 East, 609).

(2) 29 R. R. 290 (5 B. & C. 466).

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the water to a different parish, is as strong a case as can well be.)

Sir F.^c Pollock, Attorney-General, Amos, and H. R. Reynolds, contra :

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The cases of canals and water-pipes are not applicable here. In those there was an actual occupation of land which the parish officers were entitled to consider as worth a rent, whether occupied more or less profitably in the particular parish. But here, by the reduction of the rate in Foleshill, it is assumed that something may be rated as a coal-mine in Exhall, which is not, in fact, a coal-mine there. The rate, as it now stands, is for the coal obtained in Foleshill only, and for the profit of the steam-engines and *other machinery there. But the principle adopted is a mistaken one as to all the matters rated. The word "mine" is used in two senses: popularly, it signifies the place where the strata are, though unworked; legally, that only is a mine which is in a course of being worked. If the stratum is in one parish, and the access to it in another, the coal-mine is where the access is obtained: in the other parish it is merely a coal-field. When the coal is brought to light, and becomes available to the uses of man, then, and not sooner, is it a source of wealth capable of being rated. It does not become so merely by being separated from the earth, or by being placed on the trams under ground, to be brought to the shaft. In this respect it is like a mineral spring, which is rated where it first rises from the earth, and no inquiry made as to the channels it may have flowed through. Suppose a coal-mine in a parish adjoining the sea extends into strata lying under the sea; can it be said that the produce of those strata should be exempt from rate? It is the approach that gives the mine its character and its value; the coal would be useless but for the shaft: and, further, where coal is brought to the surface, the shaft and works in that place acquire an increased value, in proportion to that of the coal brought up; as, in *Rex v. Miller* (1), it was held, that the profits of the mineral spring were to be considered as part of the produce of the land, which, therefore, was subject to a higher rate, as land, in

(1) 2 Cowp. 619.

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[*597]

proportion to those profits. The value of the works in Foleshill, therefore, is to be reckoned by that of the coal brought up there, whether gotten in *Foleshill or in Exhall; the shaft must be rated in respect of the convenience it affords for raising all the coal. In 1 Nolan's Poor Laws, p. 151, 4th ed., it is said that the mine itself may be considered as the capital, and the coals at the pit's mouth as its return. It might have happened, in this case, that the appellant had been owner of the mine in Foleshill only, and had had a mere licence to work the coal in Exhall (and *Doe d. Hanley v. Wood* (1) shews that such a liberty may be granted without a demise); then the appellant would not have been an occupier in Exhall, and, if so, he would clearly not have been rateable anywhere for the coal gotten in that parish, unless he could be rated for the shaft in Foleshill in respect of the convenience it afforded him for bringing up that coal. By the argument on the other side, a great difficulty would be thrown on parish officers; they may know the parishes through which a canal is dug, or pipes are laid, but they cannot trace a coal-mine through different parishes, so as to say that any ascertained portion of coal is obtained in one parish or in another; and, even supposing this practicable now, the possibility of it could not have been contemplated when the statute of Elizabeth was passed.

LORD DENMAN, Ch. J. :

I am clearly of opinion that this was a coal-mine in Exhall, where a part of the coal lay. It is too great a refinement to say there was no mine there because all the works for raising the coal were not within that parish. According to that argument, if a coal-mine extended into twenty parishes, and all the coal was brought to the surface in one, the proprietor must *be rated in that only. The difficulty of ascertaining what is raised in each parish may be great, but here the Sessions have ascertained it.

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LITLEDALE, J. :

It is contended that there can be no coal-mine in a parish unless the apparatus for raising the coal be there. But that the

(1) 21 R. R. 469 (2 B. & Ald. 724).

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law does not consider this necessary to constitute a mine, is clear from the language of Lord Coke: "If a man hath mines hid within his land, and leases his land, and all mines therein, there the lessee may dig for them," &c. (1). So that, in legal understanding, there is a coal-mine where there are coals capable of being gotten; and the moment the coal is severed, it is gotten. There may be no machinery at the place where it is severed; but if men are sent in for the purpose, it is the same thing. The case of a spring is very different: it cannot be ascertained where that originates, or through what parishes it may pass; but a vein of coal, when particular circumstances are known respecting it, may now be traced without difficulty, though this may not have been so in the reign of Elizabeth. The case of the *Corporation of Bath* (2) was very much like this: but the present case is stronger than those in which companies have been held rateable for pipes laid in the ground to convey an artificial rill of water: here the subject of the rate is coal naturally existing at the place where the rate is imposed. As to the pits and shafts, they are rated in the one parish in which they are available for raising coal; if another shaft became necessary for raising the coal in the other parish, it would be the subject of a rate there.

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WILLIAMS, J. :

Without violating the ordinary sense of words, the appellant may be considered as occupier of a coal-mine in both the parishes. It has been said, that no value has been ascribed to the shaft and machinery, in respect of the benefit derived, through them, from the coal situate in Exhall; but they are rated, and, if the principle of the rate is not wrong, I do not see how we can say that they are rated erroneously.

Order of Sessions confirmed.

(1) *Saunders's case*, 5 Co. Rep. Co. Litt. 54 b.
12 a; and see, to the same effect, (2) 13 R. R. 333 (14 East, 609).

DAVIS *v.* GYDE (1).

(2 Adol. & Ellis, 623—628; S. C. 4 N. & M. 462; 4 L. J. (N. S.) K. B. 84.)

1835.
Jan. 27.

[623]

To an avowry for rent, the plaintiff pleaded in bar, as to 10*l.*, part of the rent, that he made his promissory note for the amount payable to the defendant at two months, which had not expired at the time when &c., and delivered it to the defendant; that he received the note for and on account of the said sum; and that he at the time when &c. held the note for that sum:

Held, that the plea was no answer as to the 10*l.*

A promissory note given and received for rent does not extinguish the claim for rent, which is a debt of a higher degree than that arising upon the note. Nor does the receipt of the note of itself suspend the right of distraining.

If the giving of the note be pleaded in bar to an avowry, it must be shewn that the note was accepted in satisfaction; or that, by special agreement or from other circumstances pleaded, it suspended the right of distress.

REPLEVIN. Avowry, for 11*l.* 5*s.*, one quarter's rent of a dwelling-house held by the plaintiff as tenant to the defendant, by virtue of a demise thereof to the plaintiff theretofore made at a certain yearly rent, &c. Pleas, (July, 1834): First, that the plaintiff did not hold the premises of the defendant under the supposed demise. Second plea, as to 10*l.* 10*s.*, parcel of the sum alleged to be due for rent, "that before the said time when &c., viz., on the 7th of April in the year 1832, the plaintiff made his certain promissory note in writing, and thereby promised to pay the defendant, or order, at a certain time, which had not elapsed at the said time when &c., viz., two months after the date thereof, a certain sum, viz., the said sum of 10*l.* 10*s.*, parcel, &c.; and that the plaintiff then delivered the said note to the defendant, and the defendant then received the said note of the plaintiff, for and on account of the said sum of 10*l.* 10*s.*, parcel, &c. And that the defendant, at the said time when &c., held the said note for the said sum *of 10*l.* 10*s.*, parcel &c. Verification. Third plea, as to the residue of the supposed rent, that no part thereof was due from the plaintiff to the defendant in manner &c. Issues were joined on the first and third pleas; to the second plea there was a general demurrer. Joinder in demurrer.

[*624]

(1) Cited and explained in judgments of KAY and A. L. SMITH, L.JJ. in *Palmer v. Bramley*, '95, 2 Q. B. 405; 65 L. J. Q. B. 42, C. A.—R. C.

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R. V. Richards, in support of the demurrer :

The giving of the note could not extinguish the claim for rent that being a debt of a higher nature : and, if it is to be contended that the note was received in satisfaction, the answer is that the plaintiff has not so pleaded. In two cases mentioned in Buller's *Nisi Prius*, *Harris v. Shipway* (1), and *Ewer v. Lady Clifton* (1), it was held that a note given for rent did not prevent the landlord from distraining for the same rent, "for it is no alteration of the debt till payment." Acceptance of a note for balance of interest on a bond is no waiver of the specialty security: *Curtis v. Rush* (2).

Knowles, contra :

The cases cited from Buller's *Nisi Prius* are distinguishable from this. It does not appear there that the notes had not been dishonoured when the action was brought ; and this supposition is favoured by the words "for it is no alteration of the debt till payment," and by the manner in which the next *placitum* is introduced (1). If they were dishonoured, no doubt the right of distraining revived. In *Kearslake v. Morgan* (3) a plea that the defendant, for and on account of a parcel of the sum claimed, indorsed a note to the plaintiffs, and delivered it so indorsed to them, and *they accepted it for and on account of the said sum, was considered sufficient by the Court, though it did not state that the note was received in satisfaction.

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(COLERIDGE, J. referred to *Richardson v. Rickman* (4), cited in *Kearslake v. Morgan* (5).)

It is true that in that case the bill appeared to have passed into the hands of a third person ; and it was urged in *Kearslake v. Morgan* (5) that the note there might in like manner have been negotiated, whereas here it is said that the defendant held the note at the time of the distress ; but at all events it was an instrument which he might at any time have negotiated ; the delivery of it to him was equivalent to a payment.

(1) Bull. N. P. 182 a, 7th ed.

(2) 2 V. & B. 416.

(3) 5 T. R. 513.

(4) 5 T. R. 517.

(5) 5 T. R. 514.

(LORD DENMAN, Ch. J.: It might be taken as an additional security, in case the goods, if distrained, should prove insufficient.)

DAVIS
*
GYDE

If the giving of the note could not avail as a payment or satisfaction, at least the defendant's receipt of it operated as an agreement to suspend the right of distress till the note should be dishonoured. That there may be such a suspension appears to be admitted by Lord ELLENBOROUGH in *Skerry v. Preston* (1).

(LORD DENMAN, Ch. J.: The taking of a note, or other transaction of that kind, may be evidence of an agreement to suspend the right. But here we cannot know from the plea what may have passed upon this subject.)

R. V. Richards, in reply:

In the case of a simple contract debt, the taking of a note would suspend the right to sue (2). But such a security has never been pleaded as suspending a claim of rent, which ranks at least with a specialty debt. It is said, 1 Roll. Abr. Debt (Extinguishment), *(A.) pl. 2, p. 605, l. 1, that rent due on lease for years is not extinguished by accepting a bond, "for that the rent is higher, being real." Nor is the note pleaded here as taken in suspension. The plaintiff, however, to avail himself of the note, should have been able to plead that it was received in satisfaction, or the amount in fact paid. Nothing to this effect appears. It is not even shewn whether the rent was due or not when the security was given. And the note is stated to have been in the defendant's hands at the time of the distress.

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LORD DENMAN, Ch. J.:

I am of opinion that the plea is insufficient. It is laid down in *Gate v. Acton* (3) that rent (whether the demise be by parol or deed) is a debt of equal degree with a debt by specialty. If so, a promissory note constitutes a debt of an inferior degree, and

(1) 23 R. R. 747 (2 Chitty, 245).

(3) 1 Salk. 326; 1 Comyns's Rep.

(2) *Simon v. Lloyd*, 2 Cr. M. & R. 67.
187.

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cannot extinguish a claim of rent. Nor can it operate in suspension of such claim; or if it could, it should have been pleaded accordingly. *Kearslake v. Morgan* (1) is not applicable. More took place there than the mere giving of a note; the security of a third party was given: here the whole transaction is between the plaintiff and defendant. Supposing even that the defendant's claim in this case were a mere ordinary debt, the plea would be insufficient, as it makes no averment that the note was received by way of satisfaction, or upon an agreement with the landlord that it should suspend his claim of rent.

LITLEDALE, J. :

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I am of the same opinion. That a demand for rent ranks with a specialty debt, appears *from *Gage v. Acton* (2), and 1 Com. Dig. Administration, (C. 2) p. 340, where it is said that an executor may pay amends for a covenant broken, before a bond, for they are in equal degree: "or, rent due upon a lease for years;" and that "tho' it be a lease by parol." That being so, can the taking of a promissory note by the lessor (which forms only a simple contract debt) be given in evidence or pleaded in bar in such an action as this? In Com. Dig. Pleader, 2 W. 46, it is said that "to debt upon a contract, the defendant may plead a bond given for the same debt," but it is added that he cannot plead "an agreement to accept a bond of the executor or administrator, and a bond given accordingly, to debt upon a bond by the testator: " "nor an agreement by parol to give a longer day of payment," to which last point Cro. Eliz. 697 (3) is cited, where the Court said, "an agreement by parol cannot dispense with an obligation." And in *Mease v. Mease* (4) it was held that a parol agreement would not be admissible in evidence against a bond. All these authorities shew that, if there be a claim on specialty, or a claim of rent, which is on the same footing, a parol agreement cannot be pleaded or given in evidence to get rid of it.

WILLIAMS, J. :

It is not pleaded that this note was received in satisfaction ;

(1) 5 T. R. 513.

(3) *Hayford v. Andrews*.

(2) 1 Salk. 326; 1 Comyns's Rep. 67.

(4) 1 Cowp. 47.

and, for the reasons already given, the receipt of it could not of itself extinguish the claim of rent. Then did the taking of the note suspend the right of distress till it should be due or dishonoured? Nothing is disclosed by the plea to raise that defence. It ought to have been expressly *shewn that, either by agreement between the parties or from some other cause, the note had such an operation. I therefore think that the plea is no answer.

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[*628]

COLERIDGE, J. :

I am of the same opinion. It is not insisted that the taking of this note operated as a payment, or an extinguishment of the claim for rent, but it is said that the right of distress was suspended. The Court, however, cannot give effect to this defence, as the plea is framed, unless they treat it as a necessary legal consequence, that the receipt of this note took away the power of distraining until the note should be due. But that is not the necessary consequence. If there was any thing that could give the transaction such an effect, it should have been specially pleaded.

Judgment for the defendant.

ATKINSON v. HAWDON.

(2 Adol. & Ellis, 628—631; S. C. 4 N. & M. 409; 4 L. J. (N. S.) K. B. 85.)

If drawer sues acceptor upon the bill, and fails in consequence of having altered the bill in a material part, he may still recover upon counts on the original consideration.

1835.
Jan. 27.

[628]

ASSUMPSIT by drawer against acceptor of a bill of exchange stated to have been made on the 28th of December, 1833, for 19*l.*, payable to plaintiff two months after date. Counts for goods sold and delivered, and on an account stated. First plea, to the first count, that the defendant did accept the said supposed bill of exchange, but that the same, when he accepted it, was dated on a certain day other than the day in that behalf in the declaration mentioned, viz. the 30th of December, 1833; and that the plaintiff, after the defendant accepted the said bill, and after the same had been issued and complete, viz. on &c., without the privity *or assent of the defendant in that behalf,

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and without the said bill being restamped, altered the said bill in a material part, viz. by altering the day of the date thereof from the said 30th, &c., to the 28th day of December, 1833 (1); verification. Second plea: as to the alleged cause of action in respect of goods, that after the making of the promise in respect of that cause of action, and before the commencement of this suit, viz. December 30th, 1833, an account was stated between the plaintiff and defendant of and concerning the last-mentioned cause of action; and upon that occasion the defendant was found indebted to the plaintiff in the sum of 19*l.*, for which sum the plaintiff on the last-mentioned day made his bill of exchange, payable to the plaintiff or order two months after date, and directed to the defendant, who accepted the same for and on account of the said 19*l.* so due and owing from him to the plaintiff; verification. Third plea, as to the account stated, *non assumpsit*.

Replication, as to the second plea, that although true it is that the defendant was found to be in arrear and indebted to the plaintiff in the sum of 19*l.*, and that the plaintiff did make and the defendant did accept the bill of exchange in the second plea mentioned on account of that sum in manner and form, &c., nevertheless the plaintiff saith that before the commencement of this suit the said bill of exchange in the said second plea mentioned became due, and the defendant did not then or at any other time before or since the said bill became due, and before the commencement of this suit, pay the said sum of money in the said bill of exchange mentioned, *or any part thereof; verification. As to the rest of the declaration, *nolle prosequi*.

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Rejoinder. That after the defendant had accepted the said bill in the said second plea mentioned, and after the same had been issued and complete, viz. on the 30th of December, 1833, he the plaintiff, without the privity or assent of the defendant in that behalf, and without the said bill being restamped, altered the said bill in a material part, viz. by altering the day of the date thereof to the 28th of December, 1833; verification. General demurrer and joinder.

(1) See *Cock v. Coxwell*, 2 Cr. M. & R. 291.

Busby, in support of the demurrer :

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The rejoinder is no answer to the replication. The bill being altered in a material respect by the plaintiff, one of the original parties to the instrument, he was remitted to the debt in consideration of which it was given : *Sutton v. Toomer* (1). It has, indeed, been decided that, in consequence of a bill being altered, the holder's remedy for his debt was altogether gone ; *Alderson v. Langdale* (2) ; but there the defendant was the drawer, and the plaintiff, who had altered the bill, was an indorsee. He, by such alteration, had deprived the drawer of his remedy against the acceptor, and could not, therefore, sue the drawer upon the original consideration. But here the parties are drawer and acceptor ; the acceptor is not put in any worse situation by the destruction of the bill ; and, it not being paid, there is no reason that the drawer should not recover for the original debt. Besides, the rejoinder does not shew when the alteration took place ; it may have been after the bill was due and dishonoured.

Wightman, *contra* :

[631]

The distinction between a drawer and an acceptor sued upon a vitiated bill must be admitted ; and the rejoinder is, therefore, bad. But the replication is also bad. It merely alleges that the bill mentioned in the second plea became due, and the defendant did not pay it. No particular *laches* is imputed. Taking the case upon the statement in the replication, it does not appear that the plaintiff still holds the bill : indeed, it may be presumed that if he did he would sue upon it. Then, if the bill is indorsed and outstanding, and the defendant liable to be called upon by the holder, the plaintiff cannot resort to the original consideration.

(LORD DENMAN, Ch. J. : This objection should have been specially pointed out.)

Per CURIAM (3) :

Judgment for the plaintiff.

(1) 7 B. & C. 416.

(2) 37 R. R. 513 (3 B. & Ad. 660).

(3) Lord Denman, Ch. J., Little-
dale, Williams, and Coleridge, JJ.

1835.
Jan. 31.

DOE D. DOUGLAS, AND FRANCES, HIS WIFE, v.
ELIZABETH LOCK.

[705]

(2 Adol. & Ellis, 705—752; S. C. 4 N. & M. 807; 4 L. J. (N. S.) K. B. 113.)

A tenant in fee simple devised lands in London, and a manor and lands in P. in Somersetshire, to a tenant for life, with power to let the lands in London for twenty-one years in possession, and also to make leases of the lands in the manor of P. for ninety-nine years, determinable on one, two, or three lives, in possession or reversion, of such parts as were or had been anciently demised for one, two, or three lives, so as the ancient and accustomed yearly rents and reservations should be thereby reserved; and also to let all other lands in P. for twenty-one years, all the leases being made and granted in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as were usually and customarily contained in leases of the same kind in the several and respective parishes and places where the said premises were situate. Leases for ninety-nine years, determinable on lives as aforesaid, having been made by the tenant for life:

1. To shew whether the first proviso in such power be complied with, the previous leases of the same premises, but not other similar leases in P., are evidence; and *seem* that the latest preceding lease of the same premises is the most proper evidence.

2. To shew whether the second proviso be complied with, leases of the same kind in P. are evidence.

3. *Quære*, whether a lease be good which reserves the ancient amount of yearly rent on the premises, but makes it payable quarterly, the ancient reservation having been of a half-yearly payment?

4. A lease under the power, with a condition for re-entry on the rent being twenty days in arrear, is not bad, although the condition in the ancient lease was for re-entry after rent being twenty-one days in arrear.

5. Nor is such lease bad for restricting the re-entry to the case of there being no distress upon the premises, the ancient restriction of the re-entry being to the case of there being no overt distress upon the premises.

6. *Quære*, whether, the ancient lease having reserved, as a heriot, the best beast of the lessee (being one of the lives), his executors, administrators, or assigns, or such person as should be in possession of the premises, and entitled to the same by virtue of the lease, a lease reserving only the best beast of the lessee (being one of the lives), be good?

7. But a lease is not bad under the power, which reserves the best beast of the person or persons who, for the time being, shall be tenant or tenants in possession of the premises.

8. A lease is not bad which reserves suit, &c., to and at the mill of the lessor (tenant for life), her heirs and assigns, and also to the person or persons to whom the freehold of the premises should belong, by grinding all corn and grain at the mill, the ancient lease having reserved the suit

to and at the mill of the lord of the said manor, and the manor having been devised to the tenant for life and the remainder-man in fee, with the lands.

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9. The reservations of rent, heriot, suit of court, and suit of mill, are strictly reservations: a reservation and exception (so called) of the liberty of hawking, hunting, fishing, and fowling, is not legally a reservation or exception, but a privilege granted to the lessor.

10. Exceptions and reservations (so called), from the demise, of timber trees, mines, and quarries, are exceptions, not reservations.

11. Nor would these necessarily be construed as coming within the word reservations in a power, though the power mentioned rent and reservations, and there appeared to be in fact no reservation besides, except rent; at any rate the construction would not be such where there were in fact reservations besides rent.

12. *Quere*, the ancient lease having excepted all mines and quarries of stone and slate, and all other mines, whether a lease is bad in which the exception is of all mines of tin, toll tin, tin works, copper, lead, and all other mines, minerals, and metals whatsoever.

13. The ancient lease excepting from the demise all timber trees and trees likely to prove timber, now standing, growing, or being, or which during the term granted should stand, &c. on the premises, and the lease under the power excepting all timber trees, bodies of pollard and other trees whatsoever, standing &c.; the latter lease is not good, the difference in the exception varying the subject-matter of the demise, and therefore the rent not being the ancient rent.

THIS was an ejectment tried at the Somersetshire Summer Assizes, 1831, before Alderson, J. A verdict was taken for the plaintiff, subject to the opinion *of this Court upon a case, which was substantially as follows:

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The premises in question are within the manor of Porlock, in the parish of Porlock, in Somersetshire.

William Blathwayt, being seised in fee of them, made his will, dated 21st of February, 1765, which was set out in the case. The material parts are as follows: "I give and devise to my wife Mary Blathwayt, all that my manor or reputed manor of Porlock, and the several capital messuages, mansion-houses, and other messuages and tenements, farms, lands, arable meadows, pasture, and wood, grounds, hereditaments, and premises, with their and every of their appurtenances thereto belonging, or in anywise appertaining, situate, lying, and being in the parish of Porlock, in the county of Somerset; as also all and singular my several fee farm, or ground rents issuing and payable out of several messuages or tenements situate, lying and being in Bow Lane and Lug Yard, in the several parishes of St. Mary's,

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Aldermanbury, and the Holy Trinity, in the city of London, and all my messuages or tenements, with the appurtenances, in the said parishes ; as likewise all and singular my fee farm, or ground rents, issuing and payable out of several messuages or tenements, situate, lying and being in St. John Street, within the parish of Clerkenwell and the parish of St. Luke, in the county of Middlesex, with all and singular my messuages or tenements, lands, and premises, with the appurtenances, in the said parishes of Clerkenwell and St. Luke, I give and devise unto my said wife, to hold to her and her assigns, from and immediately after my decease, for and during the term of her natural life, in lieu and in full recompense and bar of all dower and thirds," &c. ;
 "and from and after the *decease of my said wife, I give and devise all and singular my said manor, messuages, lands, tenements, rents, hereditaments, and premises, to my eldest son and heir apparent, to hold to him, his heirs and assigns for ever. Provided always, and my will is, that my said wife shall have full power and authority, from time to time, during her natural life, to grant leases of my said houses and premises in and near London, for any term or number of years not exceeding twenty-one years, to commence and take place in possession and not in reversion ; and also to demise and grant leases of all and every the estates and lands lying within my said manor of Porlock, for the term of fourscore and nineteen years, determinable on one, two, or three lives, in possession, reversion, or remainder of such part or parts thereof as now is, or have or hath been anciently demised and granted for one, two, or three lives in possession or reversion ; so as there be no more than three lives in being at one time ; and so as the ancient and accustomed yearly rent and reservations be thereby reserved : and also to demise and grant leases of all other my said farms, lands, and premises within the said parish of Porlock, for any term or number of years not exceeding twenty-one years, whereon shall be reserved the utmost and most improved rent that can or may be had or gotten for the same, and without having, receiving, or taking any fine for doing thereof, and so as the tenants or occupiers thereof are not dispunishable of waste : all and every such several leases of my said houses in or near London, of my said estates

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at Porlock, held or to be held for ninety-nine years determinable on lives, and of my said farms, lands, and estates, being from time to time made and granted in the same manner and form, and with and under such and the like reservations, restrictions, *covenants, conditions, and agreements, as are usually and customarily contained in leases of the same kind, in the several and respective parishes and places where the same premises are situated."

The testator died seised in May, 1787, leaving his wife, Mary Blathwayt, him surviving. Mary Blathwayt died in December, 1823. William Blathwayt, eldest son and heir apparent of the testator, by will dated 23rd of March, 1796, devised his estate in remainder in the premises to his wife Frances, one of the lessors of the plaintiff, for life. He died in 1806, leaving his wife Frances him surviving. Frances afterwards intermarried with Admiral Douglas, the other lessor of the plaintiff.

The defendant is the widow and executrix of John Lock, and claimed to hold the premises under two leases granted by Mary Blathwayt. The question was whether those leases were conformable to the power contained in the will of William Blathwayt, the original testator.

The first lease was dated the 20th of April, 1804, whereby Mary Blathwayt demised to John Lock the premises in question for ninety-nine years, if the three persons therein named should so long live; one of whom, Benjamin Floyd, was now alive.

By the second lease, dated 4th of November, 1820, the said Mary Blathwayt demised to the defendant the same premises for the remainder of the above term of ninety-nine years from the determination of the estates then subsisting therein, if two persons in this lease named should so long live, one of whom was now alive.

The only old lease now existing of the premises in question was one produced on the part of the plaintiff, from the muniment room of the estate, bearing date the *15th of April, 1756. Copies

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of the three leases accompanied the case. The lessors of the plaintiff contended that the leases of 1804 and 1820 were both invalid, in consequence of certain variations from the lease of 1756. The several objections were stated in the case: they will be seen by the following table, in which the

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corresponding clauses are contained in the order answering to that of the objections as taken in the argument for the plaintiff:

I.

Lease of 15th April, 1756, by William Blathwayt, the testator, to William Frost; *habendum* to William Frost, his executors, administrators, and assigns, after the determination, &c. (of an estate then in being), for 99 years, if the said W. F. and Joan Parkin, or either of them, shall so long live.

1. All that, &c.

Except and always reserved out of this present demise and grant, unto the said William Blathwayt, his heirs and assigns, all and all manner of timber trees, and trees likely to prove timber, now standing, growing, or being, or which, during the term hereby granted, shall stand, grow, or be, in or upon the said demised premises, or any part thereof.

2. And also except and likewise reserved as aforesaid, all mines and quarries of stone and slate, and all other mines whatsoever, in and upon the said premises or any part thereof, or to be found or discovered therein, with full and free liberty of ingress, egress, and regress, to and for the said William Blathwayt, his heirs and assigns, with his and their workmen and agents, horses, carts, and carriages, to fell, cut down, search after, dig up, and carry away

II.

Lease of 20th April, 1804, by Mary Blathwayt to John Lock, *habendum* to the said J. L., his executors, administrators, and assigns, for 99 years from henceforth, if John Lock, William Farthing, and Benjamin Floyd, or either of them, shall so long live.

1. All that, &c.

Except and always reserving out of this demise, unto the said Mary Blathwayt, her heirs and assigns, or unto such person or persons to whom the freehold of the same premises shall belong, all timber trees, bodies of pollard and other trees whatsoever, standing or growing in or upon the said demised premises, with free liberty to fell, root up, hew, saw, and carry away the same at her and their pleasure.

2. And also except and reserving all mines of tin, toll tin, tin works, copper, lead, and all other mines, minerals, and metals whatsoever, now or hereafter to be found upon the said premises, or any part thereof, with free liberty for her and them, their workmen and servants, with horses and carriages, at all times to enter, and also with full liberty to dig, work, and search for all minerals and metals therein, and to take and carry away the same.

III.

Lease of 4th November, 1820, by Mary Blathwayt to Elizabeth Lock, *habendum* to the said E. L., her executors, administrators, and assigns, from the death of Benjamin Floyd, or sooner determination of the estate now subsisting and determinable on his death, for the remainder of the term granted by the lease of 20th April, 1804, if John Ridler and Elizabeth Rawle, or either of them, should so long live.

1. All that, &c.

Except and reserving unto the said Mary Blathwayt, her heirs and assigns, and unto such person or persons to whom the freehold and inheritance of the same premises shall belong, all timber trees, bodies of pollard and other trees whatsoever, now or hereafter standing or growing in or upon the said demised premises, with free liberty of ingress, egress, and regress for her and them, their agents, workmen, and servants at all times, and to fell, root up, hew, saw, and carry away the same, with horses and every manner of carriages, at her and their pleasure.

2. And also except and reserving all mines of tin, toll, tin works, copper, lead, and all other mines, minerals, and metals whatsoever, and quarries of stone and slate now or hereafter to be found in or upon the said demised premises, or any part thereof, with like free liberty to enter with horses and carriages, and at all times to dig, work, and search for all minerals and metals, stone, and slate therein, and to take and carry away the same.

I.

the same, he, the said W. B., &c. (paying reasonable damages to be adjudged as therein specified).

3. And also except and reserved likewise, as aforesaid, unto the said William Blathwayt, his heirs and assigns, and his and their servants and attendants, full and free liberty of hawking, hunting, fishing, and fowling at all fit and seasonable times in the year, in and upon the said premises and every part thereof.

4. Yielding and paying therefore, yearly and every year, from and after the commencement of the said term hereby granted, and during the continuance thereof (determinable as aforesaid), unto the said William Blathwayt, his heirs and assigns, the yearly rent or sum of 10*s.* and 9*d.* of good &c. clear of all and all manner of taxes &c. at these two most usual feasts or days of payment in the year (that is to say), the feast of St. Michael the Archangel, and of the Annunciation of the Blessed Virgin Mary, by even and equal portions, the first payment thereof to begin and be made at and upon such of the said feasts or days of payment as shall come and happen to be next after the commencement of the present demise.

5. And also yielding and paying, at and upon the several and respective deceases of them the said William Frost and Joan Parkin, they dying successively as they are hereinbefore named in the *habendum* of these presents, and not otherwise, the best good of him the said William Frost, his executors, administrators,

II.

3. And also except the royalties belonging to the said demised premises.

4. Yielding and paying therefore, yearly and every year, during the continuance of the said term, unto the said Mary Blathwayt, her heirs or assigns, or unto such person or persons to whom the freehold of the said premises shall belong, the yearly rent or sum of 10*s.* and 9*d.* of lawful &c. by four equal quarterly payments in the year, that is to say, the 20th day of July, the 20th day of October, the 20th day of January, and the 20th day of April, freed and discharged of and from all rates, &c., the first payment thereof to begin and be made on the 20th day of July next ensuing the date hereof.

5. And also yielding and paying unto the said Mary Blathwayt and her assigns, or to such person or persons as aforesaid, upon and after the respective deaths of every of them, the said John Lock, William Farthing, and Benjamin Floyd, the lives above named, and upon every surrender or assignment of the

III.

3. And also except the royalties in any manner belonging or appertaining to the said demised premises.

4. Yielding and paying therefore, yearly and every year, from after the commencement of the said term, and during the continuance thereof, unto the said Mary Blathwayt, her heirs or assigns, or unto such person or persons as aforesaid, the yearly rent or sum of 10*s.* and 9*d.* of lawful &c. by four equal quarterly payments in the year, that is to say, the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, freed and discharged of and from all rates, &c., the first payment to be made on such of the said quarter days as shall first happen next after the commencement of the said term.

5. And also yielding and paying unto the said Mary Blathwayt, her heirs or assigns, or unto such person or persons as aforesaid, upon and after the several deaths and deceases of them the said John Ridler and Elizabeth Rawle, they dying after the commencement of the said term, the best goods of the person or persons who, for

I.

or assigns, or such person as shall be then in possession of the premises hereby granted, and entitled to the same by virtue hereof, for and in the name of an heriot: and likewise (suit of court reserved).

6. And also doing and performing, from time to time, during the said term (determinable as aforesaid,) suit, toll, custom, and service to and at the water grist mill of and belonging to the lord of the said manor, and situate and being within the same, by grinding all his and their corn and grain there.

7. And if it shall happen the said yearly rent or sum of 10*s.* and 9*d.*, and heriots, hereby reserved, or either of them, shall be behind and unpaid, in part or in all, by the space of twenty-one days next after either of the said feasts or days of payment whereon the same are hereby respectively reserved and ought to be paid as aforesaid (being lawfully demanded), and no sufficient overt distress or distresses can or may be had or found in or upon the said demised premises, or some part thereof, whereby to levy the same and the arrears thereof (if any shall be), that then (power to William Blathwayt, his heirs and assigns to re-enter).

II.

said hereby demised premises, and of every of them, the best goods of and belonging to him the said John Lock, for an heriot or farlief: and also (suit of court reserved).

6. And also yielding, doing, and performing, from time to time during the said term, suit, toll, custom, and service to and at the water grist mill of and belonging to the said Mary Blathwayt, her heirs or assigns, and also to the person or persons as aforesaid, by grinding all their corn and grain at such mill.

7. Provided, that if the said yearly rent of 10*s.* and 9*d.* and heriots, hereby reserved, or any part thereof, shall be behind, unpaid, or unperformed by the space of twenty days next after the same shall respectively become due and payable, being lawfully demanded, and no sufficient distress or distresses can be had or found upon the said demised premises, or some part thereof, whereby to levy the same with the arrears thereof, or if (certain other specified omissions, &c. shall occur), that then (power to Mary Blathwayt, her heirs or assigns to re-enter).

III.

the time being, shall be tenant or tenants in possession of the said demised premises, for and in the name of an heriot or farlief: and also (suit of court reserved).

6. And also yielding, doing and performing, from time to time, during the said term, suit, toll, custom, and service to and at the water grist mill of and belonging to the said Mary Blathwayt, her heirs and assigns, and also unto such person or persons as aforesaid, by grinding all her and their corn and grain at such mill.

7. Provided always, that if the said yearly rent of 10*s.* and 9*d.*, and heriots, hereby reserved, or any part thereof, shall be behind, or unpaid, or unperformed by the space of twenty days next after the same shall respectively become due and payable, being first lawfully demanded, and no sufficient distress or distresses can or may be had or found upon the said demised premises, or some part thereof, whereby to levy the same with the arrears thereof, or if (certain other specified omissions, &c. shall occur), then it shall be lawful (power to Mary Blathwayt, her heirs or assigns, or such person or persons as aforesaid, to re-enter).

The lessors of the plaintiff proved that their property in the parish of Porlock consisted of about 4,000 acres of land in the whole. That there were five hundred acres of land in the parish, the property of others; one hundred or more of the five hundred belonged to Lord King, and were common: one hundred of wood were Lord King's; some few Sir Thomas Acland's. The rector had about one hundred acres of wood,

and some common, and other lands. There were some few other proprietors of about three or four acres each.

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The defendant proposed to prove, that the several leases were granted with such reservations, restrictions, covenants, conditions, and agreements as were usually *and customarily contained in leases of the same kind in the parish and place where the same were situated; and for this purpose he tendered in evidence several leases granted by the said William Blathwayt of lands and tenements in Porlock; but the learned Judge was of opinion that the defendant was, in this respect, confined to the former leases of the same property. It was, however, agreed, that leases of other lands within the said manor should form part of this case, subject to the opinion of the Court on the admissibility of such leases in evidence; and that the Court should be at liberty to draw any inference of fact which a jury might have drawn from the evidence herein-after set out.

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The defendant contended, first, that there was no usual reservation in respect of trees in leases of the same kind in the same parish; for that the reservation, where it does occur, is in these thirteen varieties: 1. In three leases, "timber trees, and trees likely to prove timber, and all young saplings of oak, ash, and elm." 2. In seven leases, "timber trees fit for timber, and all young saplings of oak, ash, and elm." 3. In thirteen leases, "timber trees, and trees likely to become timber." 4. In three leases, "timber trees, and young saplings of oak, ash, and elm." 5. In one lease, "timber trees, and trees fit for timber." 6. In two leases, "timber trees, and trees likely to become timber, and all other trees." 7. In one lease, "timber trees, and trees likely to prove timber, and all young saplings of oak, ash, and elm, and all other trees." 8. In one lease, "timber trees, and trees likely to prove timber, of oak, ash, and elm." 9. In one lease, "timber trees, and trees fit for and likely to be timber, of oak, ash, and elm." 10. In five leases, "timber trees, and *trees likely to become timber, and all other trees except fruit trees." 11. In two leases, "timber trees, woods, and underwoods." 12. In one lease, "timber trees, and trees fit for timber, and all young saplings of oak, ash, and elm, with liberty to cut and take them away, paying reasonable damages."

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13. In thirteen leases, "timber trees, and trees likely to prove timber, with liberty to cut and take them away, paying reasonable damages." And that in the three next mentioned, and in nine others, at least, in that parish, there was not any reservation of timber at all; and the case then specified three leases, dated respectively in 1737, 1739, 1747; the parcels being of messuages, gardens, orchards, and arable, meadow, and pasture land.

Secondly. That there were many leases of the same kind (by the testator and his father, the former owner), of lands in the parish of Porlock, where mines, &c. were not excepted; and the case then specified five leases dated 1710, 1736, 1737, 1739, 1747; the parcels being of messuages, parks, warrens, gardens, orchards, and arable, meadow, and pasture land.

Thirdly. That in leases of the same kind in the parish of Porlock, by the testator and his father, the liberty of hawking, hunting, &c., was not reserved in any other manner than in the leases of 1804 and 1820, and that in many leases it was altogether omitted; the case then specified four leases, dated respectively 1739, 1747, 1748, 1749, the parcels being of messuages, gardens, orchards, woods, and arable, meadow, and pasture land; and it stated that there were forty-six other leases in which there was the same omission: and also one dated February 17th, 1779, to Abraham Phelps, of a messuage or tenement, with curtilages, garden, and orchard, containing *one acre and a half, with the appurtenances (except all wood and right of common), and wherein mines, quarries, hunting, hawking, and shooting, and all other royalties whatsoever were reserved. And that the same form of reservation occurred in four other similar leases.

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Fourthly. That there were many leases of the same kind in the parish of Porlock, made by the testator and his father, in which the rent was reserved quarterly; and the case then specified seven leases, dated respectively 1724, 1739, 1751, 1757, 1758, 1758, 1759, the parcels being of messuages, orchards, woods, arable, meadow, and pasture land. And that there were nine other leases of the same grantors, reserving rent quarterly.

Fifthly. That the reservation of a sum of money for a heriot

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was usual in leases of the same kind, and made by the testator or his father, of lands, &c. in the parish of Porlock, and occurred in fifty such leases: that the reservation of best beast, or best goods, was also usual, and occurred in forty-four leases: and so of the best beast, or goods, or money, with which there were thirteen leases: and that there were fourteen leases with the reservation of the best beast or best goods of the party possessed of the premises, and entitled under the lease, or in possession. The defendant instanced five leases, dated respectively 1730, 1742, 1779 (the above-mentioned lease to Abraham Phelps), 1782, 1782, in which were reserved money heriots; the immediately preceding lease having reserved the best beast or best goods.

This part of the case did not notice the objection on the sixth clause.

Seventhly. The defendant alleged that there was no usual reservation in respect of entry in default of distress, *in leases of the same kind in the parish of Porlock; and she produced two instances of leases without such a reservation, dated respectively 1714 and 1724.

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The testator, William Blathwayt the elder, granted eighty-five leases, and there were 128 other leases granted before his time. Of the said eighty-five leases, forty-nine contain the said reservations of trees, &c.; forty-one contain the reservation of a right to hunt, shoot, sport, &c.; seventy-five contain a reservation of the rent half-yearly; seventy-three contain the reservation of suit at the lessor's manor mill; and eighty-one contain a reservation of a right to re-enter in case there should be no "overt" distress upon the premises. It was contended for the plaintiff, that two leases of 1779, February 17, and October 12, were such leases as were usually granted by the testator in the said manor of Porlock (1). And, as evidence thereof, there were produced from the plaintiff's muniments two agreements found there with the said two leases, each agreement

(1) For the lease of February 17, 1779, see p. 504, *ante*, where it appears that it contained a reservation of hunting, &c. which the leases under which the defendant claimed

did not contain; and it appears to have been assumed that the lease of October 12 corresponded with that of February 17, and that neither corresponded with the lease of 1756.

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bearing date the 13th of October, 1778, and each made between and signed by the said William Blathwayt and Abraham Phelps, whereby respectively Blathwayt agreed to grant the said two leases respectively to Phelps; and each agreement contained the following clause: "The said Abraham Phelps agrees to execute a counterpart of such lease to Mr. Blathwayt, and to enter into such covenants as are usual and proper in leases of the like kind for the manor of Porlock."

[717] If the Court should be of opinion that the leases of 1804 and and 1820 were invalid, the verdict was to stand; otherwise a verdict to be entered for the defendant. The case was argued in [the previous Term, when the Court took time for consideration.]

[733] LORD DENMAN, Ch. J. on this day delivered the judgment of the COURT:

The question in this case is, whether the leases of 1804 and 1820 can be supported.

[*734] There is an existing life under each lease: supposing, therefore, that that of 1804 should appear to be invalid, if that of 1820 should be valid and now in force, it will defeat the plaintiff's right of action. The tenant for life was enabled to grant leases in possession or reversion: the lease of 1820 is made to commence on the death of Benjamin Floyd, or other sooner determination or avoidance of such estate or estates as are now granted therein and subsisting and determinable on the death of the said Benjamin Floyd, as aforesaid, for the remainder of a certain term of fourscore and nineteen years, by indentures of lease, &c. The case does not state whether Benjamin Floyd, or who else, is the existing life under the lease of 1804. If Benjamin Floyd be dead, the lease of 1820 took effect on his *death: if he be still alive, then, inasmuch as the lessors of the plaintiff disclaim the lease both of 1804 and also of 1820, if that of 1804 be not a valid one, it is at all events at an end, and the estate thereby granted is determined by the death of Mary Blathwayt, the tenant for life; and therefore it is not in strictness necessary to enquire into the validity of that of 1804. We may also observe, that many of the cases we have cited arise upon ecclesiastical leases under the statutes of 1 Eliz.

c. 19, s. 5, and 13 Eliz. c. 10, s. 3. The words of these statutes are, in substance, the same as those in the power created by the will of the testator, William Blathwayt, of 21st of February, 1765; and the same reasoning will apply to both.

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The power of leasing embraces three different descriptions of property. 1st, Premises in or near London for twenty-one years. 2nd, Premises in Porlock, which have been anciently demised, for ninety-nine years, determinable on one two or three lives, either in possession or reversion. 3rd, Other premises in Porlock for twenty-one years.

It is upon the second description that this case arises. One provision as to these is, "So as that the ancient and accustomed yearly rent and reservations be thereby reserved."

There are also some provisions applicable to the two other classes, and then there is a general clause applicable to all the three classes. "All and every such several leases of my said estates at Porlock, held or to be held for ninety-nine years, determinable on lives, and of my said farms, lands, and estates, being from time to time made and granted in the same manner and form, and with and under such and the like reservations, restrictions, *covenants, conditions, and agreements, as are usually and customarily contained in leases of the same kind, in the several and respective parishes and places where the same premises are situated."

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The second class of cases, therefore, contains two sets of provisions. 1st, That the ancient and accustomed rent and reservations be reserved. 2nd, That they be granted "in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements, as are usually and customarily contained in leases of the same kind in Porlock." The first applying to what has been done as to the ancient rent and reservations on the particular premises leased, and the other as to what is the usual and customary course upon other premises in Porlock, without reference to any ancient usage. And unless both these sets of provisions be complied with, the lease cannot be supported.

One question for our consideration is, whether other leases of the same kind in Porlock are admissible in evidence; and we

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have no doubt they are so; for it is quite impossible to know what was the course and custom of covenants, agreements, &c. of other premises of the same kind in Porlock, unless the leases be resorted to; but then, when that is done, it only applies to the second set of provisions, which we have before alluded to as contained in the latter part of the leasing power, and cannot affect the first part, which requires the ancient rent and reservations; because, as to these, it is clear that, on the wording of the power, it is only the rent and reservations of the particular property which are to be attended to; if that ancient and accustomed rent and reservation shall be found to have been satisfied and complied with, it would then, and then only, be the *subject of enquiry, whether the covenants and agreements, &c. of the other premises in Porlock have also been adopted, so as upon the whole to make a complete and perfect lease, according to the two sets of provisoes comprised in the power.

That being so, it becomes necessary to ascertain what are the ancient rent and reservations as to the particular tenement; and, in considering that, the proper evidence is the last lease: as to which it was said by Lord HOLT, in *Orby v. Lord Mohun* (1), which arose upon the construction of a power, that "that shall be deemed the antient rent, which was the rent at the time the power was reserved, or when the last lease before was made, if the estate was not then under lease:" and he refers to *Morrice v. Antrobus* (2), which was a lease made by the petty canons of St. Paul's for twenty-one years, where three other leases, at less rent, and with larger exceptions, were referred to: HALE, Chief Baron, said that the accustomed rent mentioned in the statute (13 Eliz. c. 10) ought to be understood of the rent reserved in the last lease, and not upon the first, for that rent having been altered since, cannot be called the accustomed rent. But whether this position be right or not, the lease of 1756 is the only evidence there is of what had been the accustomed rent and reservations; and as this lease was only nine years before the date of the will, we may fairly conclude that it was the last lease before the will, and, therefore, must necessarily be attended to.

(1) 2 Vern. 542. S. C. 3 Rep. Ca. (2) Hardr. 325.
Ch. 102 and Prec. Chan. 257.

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First, as to the rent; it is the same in the amount in all the leases of 1756, 1804, and 1820: and the general *description of the premises is the same in all, subject only to the exceptions which will be hereafter noticed. But it is not merely the amount of the ancient rent reserved, but it must be reserved with all the beneficial circumstances; by Lord MANSFIELD in delivering the judgment of the Court in *Taylor d. Atkyns v. Horde* (1). And the first point raised upon that is, that by the lease of 1756 the rent is payable half yearly, whereas by those of 1804 and 1820 it is payable quarterly. On a quarterly reservation, if the tenant for life died in the first portion of the half year, the remainder-man would receive both the first and second quarter's rent of the half year, and would, therefore, be in the same situation as if the rent had been reserved half yearly; but if the tenant for life died in the second quarter of the half year, the tenant for life would receive the first quarter, and the remainder-man only the second quarter, and he would, consequently, be in a worse situation than if the rent had been reserved half yearly. This, however, is only a contingency, and may or may not happen, and it is to be seen whether that would avoid the lease. In *Lord Mountjoy's case* (2), where tenant in tail, under a special Act of Parliament in the time of Henry VIII., was empowered to grant leases rendering the true and ancient rent, the tenant in tail made a lease reserving the rent to be paid at two feasts of the year, where the old rent was payable at four feasts; and one of the points which, after many arguments, and great deliberation and consideration, were resolved, was, that the reservation of the rent at two days where the rent was reserved payable at four days, makes the grant and render void, because it is *ad nocumentum* of the heirs in tail, which is restrained *by the Act; for it is more beneficial for them to have it paid at four feasts than at two: and all beneficial qualities of the rent ought to be reserved and observed.

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Now, if this decision be correct, it seems difficult to say that a lease is void for reserving the rent at four days instead of two; the new lease need not be a *fac simile* of the old one; all that is

(1) 1 Burr. 121.

(2) 5 Co. Rep. 3b.

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to be done is, to see that the remainder-man is not prejudiced. And there can be no doubt but a rent payable at four feasts is upon the whole term created more beneficial than if payable at two feasts, though there is a possibility that, as to one quarter, the remainder-man may be prejudiced, but that is a contingency ; and, even if it does happen, there is the benefit of the quarterly instead of the half-yearly payments during the rest of the term.

But, after all, it may be said that increasing the number of days of payment should be shewn to be warranted by decided authority. The benefit to the successor is differently treated in *Baugh v. Haynes* (1), on a lease made by a Dean and Chapter. The former lease had reserved the rent at four feasts, and a heriot. The lease in question reserved the rent at two feasts without the heriot. The Court held that the omitting the heriot did not avoid the lease, because only a rent was mentioned in the statute (13 Eliz. c. 10) ; and they said that a reservation at two feasts instead of four was no objection to the lease, for it was for the benefit of the successor. So in *The Dean and Chapter of Worcester's* case (2), where the former lease made the rent payable at four feasts, and the lease in dispute at two ; the Court held that it was sufficient if the accustomed rent be reserved *yearly at one time ; for the words of this Act are, "whereupon the accustomed yearly rent or more shall be reserved ;" and, therefore, if the rent be yearly reserved, the statute is satisfied by reason of this word "yearly," and so there is a difference between this and *Lord Mountjoy's* case (3), for there wanted the word yearly, which explains the intention of the makers of the said Act of 13th Eliz. Co. Litt. 44 b is in accordance with this latter doctrine.

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None of these cases, however, shew what effect has been given to the increasing the number of rent days. In *Cook v. Younger* (4) the plaintiff declared that the office of under steward of the courts of the manor of Keysham, and other manors of the Bishop of Gloucester, was anciently an office grantable for term of life with the fee of 3*l.* 6*s.* 8*d.* by the year ; and it was granted by a former Bishop of Gloucester to the plaintiff for life, with the fee of

(1) Cro. Jac. 76.

(2) 6 Co. Rep. 37 a.

(3) 5 Co. Rep. 3 b.

(4) Cro. Car. 16.

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3*l.* 6*s.* 8*d.*, payable annually at two feasts, issuing out of the manors: the Bishop died, and the plaintiff was ready to keep the courts of the new Bishop, but the defendant claiming under a grant from the new Bishop, disturbed him from keeping them: and one of the objections to the grant to the plaintiff was, that the prescription was that the office was grantable with a fee of 3*l.* 6*s.* 8*d.* by the year, and here the payment is appointed to be at two feasts. But the exception was not allowed, and to confirm their opinion the case of *The Dean and Chapter of Worcester* (1) was vouched, that the days of payment are not material where no less than the ancient rent is reserved yearly. It does not indeed appear by this report how the former grants had been; *but as it is put upon the footing of prescription, it may be inferred that the former grants made the payments yearly.

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Of late two cases have occurred applicable to this; one, *Doe d. Earl of Shrewsbury v. Wilson* (2), where the power of leasing under a private Act contained the clause, "so as upon all and every such lease and leases, there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services, &c." A lease was made in 1785 under this power, reserving the rent half-yearly. It appeared that in 1708 a lease, and in 1756 another lease, had been made of the same premises, in which the rent was reserved half-yearly, and amongst other objections made to the lease of 1785, one was, that the rent was reserved half-yearly, whereas by the power it ought to have been reserved only once a year. The Court held the lease to be sufficient; but the principal ground on which they decided was, that the former leases which were admitted in evidence, made the rent payable half-yearly, and the lease of 1785 mentioned the usual and accustomed yearly rent; and, therefore, that case does not assist the construction that is to be put upon the present leasing power, as to whether the reservation in the lease of 1756, as to the times of payment, is to be observed, any further than the general remark of Lord Chief Justice ABBOTT, that the usual and accustomed yearly rent means the yearly rent of so many pounds by so many half-yearly or quarterly payments in the year. It is to be observed

(1) 6 Co. Rep. 37 a.

(2) 24 R. R. 423 (5 B. & Ald. 363).

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that he and Mr. Justice BAYLEY differ in their opinions as to a rent being made payable once a year ; *the former saying it is not beneficial to the landlord, and the latter that it is more beneficial to the successor.

In *Doc d. Harries v. Morse* (1) the leasing power, in a marriage settlement in 1777, provided that there should be reserved by half-yearly payments the best and most improved yearly rents. In 1783 a lease was made, reserving the rent at the feast of St. Philip and St. James (1st May), and St. Michael (29th September). The Court held the lease void (besides other reasons), because the half-yearly payments ought to have been on usual days of payment, and that it required a division of the rent as near as may be into two equal half-yearly payments, which this did not ; one interval being one hundred and fifty-one and the other two hundred and fourteen days, though the usage of the country might make a different division. In this case of *Doe d. Harries v. Morse* (1) Mr. Baron BAYLEY says, the tenant for life is not to throw on the remainder-man, without his sanction, the uncertainty of the chances which may turn out to his prejudice.

Amongst all these conflicting authorities, it is very difficult to come to a conclusion on this part of the case : it is not however necessary to do so, because there is another ground upon which we are enabled to give judgment.

Another objection is, that the lease of 1756 gives a power of re-entry if the rent be in arrear twenty-one days, whereas the leases of 1804 and 1820 give the right of entry after twenty days : the latter provision is more beneficial to the remainder-man.

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Another objection is, that, in the lease of 1756, the *right of entry is, if there be no “ overt ” distress on the premises, which word “ overt ” is omitted in the two leases of 1804 and 1820. But we think that this is not a valid objection : the law recognises a difference between a pound overt and a pound covert ; but, as to a distress, the law does not affix any meaning to the word “ overt.” Is overt to be confined to what may be seen by walking over the lands and farm-yard, without going into any inclosed buildings ? or does it extend to what may be seen by opening the

outer doors of a house or other buildings? or what may be seen by opening inner doors? or by opening cupboards, chests, and boxes, which are not concealed, and have no locks? or various other shades of being less overt? So many opinions may be formed about the extent of the meaning of the word, that we cannot attribute any legal meaning to it.

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As to the heriots: under ecclesiastical leases, though heriots should have been reserved under former leases, it appears their omission forms no ground of objection to a new lease, because it is only rent which is mentioned in the statute: but, under the power now in question, heriots were reserved in 1756, and, consequently, the ancient reservations made in the new leases must be heriotable. The heriots are different in all the three leases. Under that of 1756 it is the best goods of William Frost, or such person as shall be in possession of the premises: under that of 1804 it is the best goods of John Lock: under that of 1820 it is the best goods of the person or persons who, for the time being, shall be tenant or tenants in possession of the premises. We by no means say that the lease of 1804 is objectionable; for, as the payment of these heriots (should the heriot reserved be refused) can only be enforced by *distress or action, as it is not a heriot by ancient tenure or custom, but only by deed (*Edwards v. Moseley* (1)), a distress may be made of the best beast of John Lock, if alive, or, should he be dead, or have parted with the premises, what was his best beast. But the lease of 1820 is, in effect, the same as that of 1756; and the only reason of omitting the name in that of 1820, to correspond with that of William Frost in that of 1756, seems to be, that the lessee in that of 1820 was not one of the lives; whereas, in that of 1756, William Frost, who was the lessee, was also one of the lives.

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As to the reservation of suit to the mill, the difference is, that in the lease of 1756 the lord of the manor is mentioned; and in the other, the owner of the inheritance: that can make no difference.

To the reservation of suit of court no objection is made.

The rent, heriots, suit of mill, and suit of court, are the only things which, according to the legal sense and meaning of the

(1) Willes, 192.

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word, are reservations. For we are of opinion, that what relates to the privilege of hawking, hunting, fishing, and fowling, is not either a reservation or an exception in point of law; and it is only a privilege or right granted to the lessor, though words of reservation and exception are used. And we think, that what relates to the wood and the underground produce is not a reservation, but an exception. Lord Coke, in his Commentary on Littleton, 47 a, says, "Note a diversity between an exception (which is ever of part of the thing granted, and of a thing *in esse*), for which, *exceptis, solvo, præter*, and the like, be apt words; and a reservation *which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised." In Sheppard's Touchstone, p. 80, "A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that which he granted before:" and, afterwards, "This doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before; so that this doth always reserve that which was not before, or abridge the tenure of that which was before." And afterwards, "It must be of some other thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing." And afterwards, "If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grass, or of the vesture of the land or of a common, or other profit to be taken out of the land; these reservations are void." In Brooke's Abridgment, title Reservacion, pl. 46, it is said that if a man leases land, reserving common out of it, or the herbage, grass, or profits of the land demised, this is a void reservation, for it is parcel of the thing granted, and is not like where a man leases his manor and the like, except White Acre, for there the acre is not leased; but here the land is leased; therefore the reservation of the herbage, vesture, or the like, is void. It must be observed, however, that, though in Co. Litt. 47 a, the distinction between a reservation and an exception is pointed out, yet in page 143 a, speaking of the word "reservation," Lord Coke

says, "Sometime it *hath the force of saving or excepting. So as sometime it serveth to reserve a new thing, viz. a rent, and sometime to except part of the thing *in esse* that is granted." He does not, however, go on to illustrate that position; and as, only two pages before, in 142 a, he had said to the same effect as he had done in the former reference in 47 a, that "a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that should be repugnant to the grant," we cannot take this language of Lord Coke in 143 a as identifying an exception and a reservation.

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There are, however, some cases reported, where, in the language of the Court, the word "reserve" is treated as meaning "exception," as in *Dyer*, 19 a (1). That, however, is only general language; and it does not make them the same in point of law. In the very late case of *Fancy v. Scott* (2), the defendant pleaded that the plaintiff was tenant to the defendant of the close in which &c., subject to a reservation to defendant of all pits in the close, with liberty to carry away the produce of the pits; and Mr. Justice BAYLEY said it was not a reservation, but an exception, and held the plea bad; and the counsel for the defendant did not further press the argument.

It may be said, however, that, if the person who creates the power uses the word "reserving" in such a way as to make an exception a reservation, it must be so taken; but we think not necessarily. Powers in many respects are construed so very strictly, that they must be so throughout.

But, besides, it is not necessarily to be taken that what relates to the wood and underground produce is a reservation; there are other legal reservations, besides rent, to satisfy the words "rent and reservations;" and when the testator, in the lease of 1756, mentions wood and underground produce, he says except and always reserved out of this present demise and grant, all, &c.; and therefore, if, in point of law, the matters are the subject of exception, they must be applied to the legal term used. And in *The Earl of Cardigan v. Armitage* (3), where Sir Thomas Danby

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(1) Pl. 110.

(2) 2 Man. & Ry. 335.

(3) 26 R. R. 313 (2 B. & C. 197).

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enfeoffed the Earl of Sussex of certain closes, except and always reserved out of the said feoffment to the said Sir Thomas all the coals in all or any of the said lands, together with free liberty to sink and dig pits, &c., Mr. Justice BAYLEY, in delivering the judgment of the Court upon the pleadings, says, this constituted an exception; and he states the distinction between an exception and a reservation, and then he goes on to point out the effect of an exception upon the statement in the pleadings.

Upon all these authorities, we are of opinion that what is said as to the wood and underground produce is not a reservation, but an exception; and then it will be necessary to consider what effect this has upon the lease.

The mines, quarries, &c. need not be considered, because the lease of 1820 is, though not precisely in words, yet in substance, conformable to the lease of 1756; though, if it had stood upon the lease of 1804 alone, it might have been questionable.

[*747] In the lease of 1756 the exception is, of all and all manner of timber trees, and trees likely to prove timber. *In the two other leases of 1804 and 1820, it is, all timber trees, bodies of pollard and other trees whatsoever. By the lease therefore of 1756, the entire timber trees and trees likely to prove timber are excepted, whereas, in the other leases, the entire timber trees are excepted, but only the bodies of trees likely to prove timber; leaving therefore the upper part of these trees, from which lops, tops, and boughs might be taken, unexcepted: but then, in lieu of that, in the other two leases the bodies of pollard and all other trees, including all such other trees as are not likely to prove timber, are excepted: and one would say that, in most cases, the remainder-man would be a gainer by such substitution; but we cannot say so on any legal principle, and, therefore, that cannot be acted upon. Under the terms of the lease of 1756, the remainder-man would have a right to cut, take, and carry away the tops, and boughs, and shrouds likely to become timber, which he now loses; but, though he loses that right, the lessee has no general right to do so; the right he has is, to have the benefit of those tops for fruit and shade, and he has also a right to take them for certain descriptions of repairs.

A great variety of cases have occurred, and several distinctions

been made, both formerly and in later times, where lands comprised in a power are demised along with other lands to which the power does not apply, or where the power is well executed as to part, and not as to the rest; or where part of the lands only is comprised in the power, as far as demised under former leases. But this principle at all events seems to be established, that, where lands are let at an ancient rent, and where the new lease grants that which was not anciently let, in addition to what was granted before, and only *reserves the same rent that was reserved before, the power is badly executed, and the lease is void for the whole.

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Even where an additional rent is reserved where new land is added to the old, the lease is void for the whole; unless, perhaps, there be a distinct reservation for the new land, as appears by Co. Litt. 44 b, where it is said, "if twenty acres of land have been accustomably letten, and a lease is made of those twenty, and of one acre which was not accustomably letten, reserving the accustomable yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomable rent is not reserved, seeing part was not accustomably letten, and the rent issueth out of the whole." The same rule is laid down in *Lord Mountjoy's* case (1); and also confirmed in the late case of *Doe d. Bartlett v. Rendle* (2). But, as more distinctly applicable to the present case, may be cited *Smith v. Bole* (3). The prebend was usually let, with the exception of all crab trees, and such like trees, rendering 17l. a year; afterwards another lease was made, omitting the exception, at the ancient rent, and it was resolved that the lease was void; "for there being more let than was anciently, the trees and the profits of the trees, and the soil itself, is excepted by this exception, so as every successor cannot have the benefit of boughs and fruits yearly renewing; and the soil itself whereupon they grow is excepted: but by this new lease, the trees and profits are let and the soil itself; and so more being let than anciently, it is not within the statute of 32 Hen. VIII.: and it is void by the statute of 13 Eliz., for *it is not the ancient rent, where there be more

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(1) 5 Co. Rep. 5 b.

(3) Cro. Jac. 458.

(2) 15 B. R. 426 (3 M. & S. 99).

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let than was before." The same case is also reported in 3 Bulst. 290; but it is not there stated that the new lease was at the same rent. In note [261] to Hargrave and Butler's Co. Litt. 44 b, a prebendary makes a lease for years, reserving the running of a colt, rendering rent. A new lease, rendering the same rent, without reserving the running of a colt, adjudged good, because, *quoad* this, it is neither a reservation nor exception. But if lease be of a manor, except the woods, rendering rent, and after the expiration of it there is a new lease rendering the same rent without such exception, the second lease is bad: T. 18 Jac. B. R., case of *Precentor of Paul's*, Hale's MSS.

There is, however, a case in Ventris's Reports, *How v. Whitfield* (1), which, if it were to be held as law, might seem to affect the generality of this proposition. A power given to the lessee and his assigns to let leases (2) for twenty-one years, rendering the ancient rents, and the assignee made a lease of the lands *inter alia*, at the rent of six shillings a year, which was the ancient rent. As to reserving the rent *proinde*, the Court said, that it might be intended that the *inter alia* comprehended nothing but such things out of which a rent could not be reserved; and then the six shillings was reserved only for the five acres. However, the *proinde* might be reasonably referred only to the five acres, and not to the *inter alia*, and that a distinct reservation of the six shillings might be for five acres. But in the report of the same case, Sir Thomas Jones, 110, it is said the Court thought this to be a good exception; and the *defendant, perceiving the opinion of the Court as to the great point (3), consented, upon payment of costs, that judgment should be given for the plaintiff.

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The case is also reported in 2 Shower, 57, where it appears to have been argued on another point; and JONES and PEMBERTON, JJ. seemed to have entertained different opinions: and the case as reported in Ventris, it should seem, cannot be relied upon.

A question, however, may arise, as to this exception, whether the lops of the trees are demised at all, or whether there is not a mere privilege vested in the lessee, by virtue of the demise, to

(1) 1 Vent. 338, 339.

(3) A different point, not noticed

(2) Of a close containing five acres. here.

take the lops and shrouds of the trees likely to prove timber for repairs and fuel; and then, if they be not demised, the ancient rent may be said to be reserved for the rest which is really demised. But we are of opinion that the tops of the trees likely to prove timber are demised. By a general demise of lands on which there are timber trees, without any exception, the timber trees are demised as well as the lands. It is true that the lessee has not the same extent of interest that he has in the lands; he has only a particular interest and a special property in them, and is only entitled to the mast and fruit, &c., and shade of the trees, and may also take them for repairs and fuel (subject, as to fuel, to some observations), and the lessor has the general ownership, right, and inheritance; and, if they become disannexed from the inheritance, the lessor shall have them: and, in the report of *Pomfret v. Roycroft* (1), Mr. Justice TWISDEN says, at the end of the case, which was as to the use of a pump, that, "he conceived, that if the lessor cuts down *trees growing upon the land demised, no covenant lies, yet the trees are demised with the rest."

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The same rule would hold as to the tops of trees. We do not think it material whether a rent could issue out of them; they form along with the lands one entire subject of demise. These lops and shrouds may, perhaps, be considered as amongst the *de minimis*, but that is not so; they may, in some cases, be of such value as may be worth attending to, and the want of power to cut them is a prejudice to the inheritance, and the right to cut lops, tops, and shrouds appears in several instances to have been the subject of inquiry: and it may be observed, as to this, that, if the whole of the trees likely to prove timber are excepted, the lessor and other future owners of the inheritance may cut both bodies, lops, and tops when they please; but if only the bodies are reserved, they could not cut the bodies down, for they could not do so without also cutting down the tops, and as to which they would have no right to do so, because the lessee would have an interest in them for repairs and fuel, and for the fruit and shade for his cattle.

We are therefore of opinion, that, as the exception in the lease of 1756 as to the wood is larger than in those of 1804 and 1820,

(1) 1 Vent. 44.

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the premises cannot be taken to have been demised at the ancient rent, and that, therefore, both the latter leases are void on that ground.

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It becomes, therefore, unnecessary to consider what effect the other leases would have had; if the point had been to be considered, it would have been impossible for the Court to have decided on the effect of such a mass and variety of matter, and it must have gone *to a jury. It may, however, be remarked that, in the clause in the power which says the leases are to be conformable to other leases in the parish, there is the word "reservations;" and it might be said to be necessary to inquire what the reservations were in other leases; but, in our view of the case, reservations do not affect the decision of the case, and if they had, the word "reservations" would be held to be other and different ones than the ancient reservations under leases of the same premises.

There must be judgment for the plaintiff.

Judgment for the plaintiff.

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Jan. 31.
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SAMUEL AND PHILLIPS v. COOPER AND LEVEY:

(2 Adol. & Ellis, 752—757; S. C. 4 N. & M. 520; 1 H. & W. 86.)

A cause, and all matters in difference therein between the plaintiffs and defendants, were referred to a barrister, who stated in his award that the plaintiffs had claimed certain sums before him as matters in difference in the cause, but that he, by his said award, declared and determined them not to be so; and he then awarded as to other matters, in respect of which he gave a verdict to the plaintiffs.

On motion to set aside the award as not being final, it appeared, by affidavit, that, upon the above sums being claimed, on the reference, by the plaintiffs (who had specified them in their particular of demand), the defendants objected that they were not matters in difference, nor within the arbitrator's authority, part of them being recoverable, if at all, in equity and not at law, and part being claimable against one only of the defendants: whereupon, the plaintiffs abandoned their present demand as to these.

Held, that the award was bad, for not deciding upon all the matters in difference referred.

THIS was an action for work and labour, for commission, and on money counts. The cause coming on for trial at Guildhall

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(February, 1833), a verdict was taken for the plaintiffs, subject to the award of a barrister, to whom all matters in difference in the said cause between the plaintiffs and defendants were referred, to order and determine what he should think fit to be done by the parties respecting the matters in dispute. The arbitrator awarded as follows: * "Whereas the said plaintiffs have claimed upon the said reference before me that four several cheques, that is to say (describing four cheques for 50*l.* each), and the sums of money secured by the said cheques respectively, or paid in respect thereof, were matters in difference in the said cause; now therefore I do declare and determine that they are not matters in difference, and that neither of them is a matter in difference in the said cause: and whereas on or about &c., a certain agreement was made between the said plaintiffs and the said defendants, whereby the said defendants engaged that the amount of sundry hosiery, sixty-four puncheons of rum, and twenty-nine pipes of geneva, to be consigned to New South Wales, and amounting to 1,584*l.*, less the freight, 208*l.*, to be paid by the said defendants," &c., "should be remitted to the said plaintiffs, with the half amount of profit arising on the sale:" "and whereas the said plaintiffs have claimed upon the said reference that the profits arising on the said sale and transaction were a matter in difference in the said cause, I do further declare that the said profits are not a matter in difference in the said cause, but I have treated the price of the said goods as a matter in difference in the said cause." And the arbitrator awarded that there was due to the plaintiffs, in respect of the matters in difference in the cause between the said parties, 12,929*l.*, for which sum he directed a verdict to be entered.

Sir John Campbell in this Term (January 27th) moved for a rule to shew cause why the award should not be set aside, on the ground that it was not final. The affidavits upon which he moved stated, "that the profits *arising upon the hosiery, geneva, and rums in the said award mentioned, as well as the principal sum in respect thereof in the said award mentioned, were by the plaintiffs debited to and charged against the said defendants, and composed part of the particulars of demand in

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this action, and of the claim against the defendants carried in before the arbitrator, and was insisted upon by the plaintiffs before him to be due and owing to them by the defendants, and a matter in difference in this cause; and that the plaintiffs still claim the profits aforesaid to be due and owing to them by the said Daniel Cooper as surviving partner of the said firm of Cooper and Levey." It was also stated that the four sums of 50*l.* were debited to the defendants by the plaintiffs, and formed part of their particulars of demand, and of the claim insisted upon by them before the arbitrator, and were a matter in difference in the cause. *Sir J. Campbell* contended that the arbitrator ought to have determined whether the defendants were liable to the plaintiffs upon these items or not; that these were in fact matters referred, and that the arbitrator could not exclude them from consideration by finding that they were not in dispute.

(LITLEDALE, J.: Some one must determine whether they are so or not; and with whom does the decision rest?)

With this Court.

[*755] The Court granted a rule *nisi*. An affidavit was made in opposition, stating, among other things, that although the four sums of 50*l.* were claimed by the plaintiffs on the reference, the defendants' counsel objected before the arbitrator that those sums, or any question relating thereto, were not matters in difference in the cause, nor within the authority of the arbitrator, inasmuch as the sums were not advanced to or on the *credit of the defendants jointly, but to and on the credit of Levey, whereupon it was admitted by the plaintiffs' counsel that those sums were not a matter in difference as between the parties in the present cause, and the demand as to them was abandoned as a demand in this cause, it being agreed on all hands that the only matters in difference in this cause were matters in which the defendants were liable jointly. The affidavit further stated, as to the profits on the sale of goods, that the defendants' counsel also objected before the arbitrator that these were not a matter in difference in the cause, nor

within the arbitrator's authority, and could be recovered only by bill in equity; which objection, being discussed, was held good by the arbitrator, and the claim as to the said profits was abandoned, as a demand in this action. In this Term (January 30th),

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Sir F. Pollock, Attorney-General, *Kelly*, and *Martin* shewed cause (1) :

The arbitrator, by awarding that the several sums in question were not matters in difference in the cause, had substantially awarded that no recovery for them can be had in this action, which is a finding for the defendants as to so much. It is as if he had said, for instance, as to the sums of 50*l.*, "this is a good claim against one of the defendants, but not against the two jointly." There can be no question that the matters were brought before the arbitrator, and they were decided by him. The defendants are protected as to these sums for the future, for they will be entitled to say, that if the plaintiffs had had any joint demand respecting them they would have insisted on it, and, *therefore, that it has been settled by the award: *Dunn v. Murray* (2). A party who sues for less than he knows to be recoverable in that action, cannot afterwards sue for the sum omitted: *Lord Bagot v. Williams* (3). Besides, here the defendants themselves objected that the items were not matters in difference in the cause, and acquiesced in the arbitrator's ruling in favour of their objection.

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Sir John Campbell and *Maule*, *contra* :

First, these sums were matters in difference in the cause: for they were in the particular of demand, and were claimed before the arbitrator; and they are within the scope of the declaration. If these had been the only sums in the particular, it is clear the award must have decided upon them; and, if so, it ought to have decided upon them in the present case. Then, has that been done which would enable the defendants, upon any future

(1) Before Lord Denman, Ch. J., (2) 33 R. R. 327 (9 B. & C. 780; 4 Littledale, Williams, and Coleridge, Man. & Ry. 571).
JJ. (3) 27 R. R. 340 (3 B. & C. 235).

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controversy, to treat the question as to these sums as a *res judicata*? The award does not include, but expressly excludes them. It would not protect the defendants against an action hereafter. *Dunn v. Murray* (1) is not applicable, because there it was evident that the arbitrator had awarded upon all that the plaintiff brought before him: here the contrary appears. In *Lord Bagot v. Williams* (2) the plaintiff waived a part of his demand; here the plaintiffs urged it, but without success. It is consistent with the award that, as to some part of the money at least, there may have been an unexpired credit at the time of commencing the suit. There was no consent by the defendants to the omission of these sums in the award; they resisted the claim of them, as one which could not be enforced in this action, and against these parties; but they did not give up their right to have an award as to that claim; they could not intend that it should remain open to be litigated in a future action. And the arbitrator, by his award, does in fact undertake to "declare and determine" as to these demands. If they had not been a matter in difference, he could not, by his finding, have made them one; nor can he, by his finding, make them otherwise, if they are a matter of difference.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT as follows:

We have considered the affidavits in this case, and have reluctantly come to the conclusion that the rule must be made absolute. All matters in difference in the cause between the parties were referred to the arbitrator, and there were matters in difference so referred upon which he has not decided. We do not see any means of avoiding the consequence, which is, that the award must be set aside.

Rule absolute.

(1) 33 B. R. 327 (9 B. & C. 780; 4 Man. & Ry. 571). (2) 27 R. R. 340 (3 B. & C. 235).

W. TRIMINGHAM *v.* G. TRIMINGHAM.

(4 Nevile & Manning, 786—787.)

1835.

[786]

Where all matters in difference are referred to an arbitrator, an award directing the execution of general releases closes all accounts between the parties up to the time of the submission.

ALL matters in difference between these parties having been referred to two arbitrators, they awarded that 729*l.* 6*s.* was due from G. T. to W. T., and directed that general releases should be executed by both parties. A portion of the sum awarded being unpaid, and an additional sum having become due from G. T. to W. T., the present action was brought, and all matters in difference between them were referred to Simpson, one of the former arbitrators. Simpson entered into a claim which had existed at the time of the former submission, and awarded partly in respect of that claim. Upon affidavits stating the above facts, *Cresswell* obtained a rule to set aside the award, on the ground that the arbitrator had gone into matters decided upon by the former award, and which he could not lawfully re-open. *Simpson, who made an affidavit in answer, stated that he had not, upon the second reference, entered into any matter before decided upon or before discussed. The other arbitrator (under the first submission) also made an affidavit, confirming that of Simpson.

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Campbell, A.-G., in shewing cause, referred to and relied on the affidavits in answer.

Cresswell, *contra* :

The affidavits are artfully framed to evade the real question before the Court.

(PATTESON, J. : All that the deponents swear is, that the items were not gone into upon the former reference, not that they might not have been gone into.)

The first award orders general releases. Every thing, therefore, which might have been gone into under that reference, must be

TRIMINGHAM taken to have been decided on. *Wharton v. King* (1), *Birks v. v. TRIMINGHAM Trippet* (2).

LORD DENMAN, Ch. J. (stopping *Cresswell*) :

It is perfectly plain, that where general releases are awarded, it must be taken that the whole accounts between the parties are settled.

Rule absolute.

1835.
April 22.

BARROW v. LORD ASHBURNHAM.

(4 L. J. (N. S.) K. B. 146—147.)

[146]

Landlord and tenant—Evidence—Implied contract.

In a conversation between a person who subsequently became the tenant, and the steward of the landlord, the former said, "I have no objection to take the farm, if the game is destroyed. I don't care so much about the birds as the hares and rabbits." To which the latter said, "Why, you are a man who keep no dog, and use no gun, and you ought not to annoyed with rabbits and hares: you must let the keepers know, and they must kill them;" upon which the tenant said, "Then upon these terms I will take the farm:" Held, sufficient evidence for the jury to infer a contract on the part of the landlord to kill the hares and rabbits; and that the landlord was liable to damages committed by the hares and rabbits on the tenant's farm.

THIS was a special action of assumpsit, by a tenant against his landlord. The declaration stated, that in consideration that the plaintiff, who was tenant to Lord Ashburnham, and had undertaken to keep no dog or gun, the defendant undertook to kill the hares and rabbits upon the plaintiff's farm, after notice given to the keepers, and alleged a breach and consequential damages. There were several issues raised upon the record, but it is not material to state them.

At the trial before Gaselee, J., at the last Assizes for the county of Lewes, the evidence given to support the contract, was of a person of the name of Quaife, relating a conversation which took place between Barrow (the plaintiff) and a man of the name of Pennington, the steward and authorized agent of Lord Ashburnham, which was as follows: Barrow said, "I have no objection to take the farm, if the game is destroyed. I don't

(1) *Moody & Rob.* 96.

(2) 1 *Saund.* 28 c.

care so much about the birds as the hares and rabbits." Mr. Pennington said, "Why, you are a man who keep no dog, and use no gun, and you ought not to be annoyed with rabbits and hares: you must let the keepers know, and they must kill them;" and Barrow said, "Then upon these terms I will take the farm." A verdict was found for the plaintiff, for 150*l.*, with leave to the defendant to move to enter a nonsuit.

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HAM.

Long, pursuant to the leave reserved, now moved, contending that the conversation which took place between Barrow and Pennington did not support the contract, as laid in the declaration. He contended, that it could not be said that there was any undertaking on the part of the plaintiff not to keep any dog, or use any gun; nor did it raise any undertaking on the part of the defendant to kill the hares and rabbits. It was only evidence of a mere understanding between the parties, that the hares and rabbits, if notice was given to the keepers, should be kept under, but it is too indefinite and vague for the Court to raise any implied assumpsit upon it, to kill the hares and rabbits.

LITTLEDALE, J. :

I do not see how a Judge could nonsuit the plaintiff upon that evidence. It was a matter for the jury to find, whether there was any contract; and, taking the conversation altogether, it may be considered to have raised an obligation on the part of the tenant not to keep any dog or use a gun.

LORD DENMAN, Ch. J. :

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It appears to me, that the jury were right in considering this to be evidence of a contract to kill the hares and rabbits.

Rule refused.

IN THE COURT OF COMMON PLEAS.

1834.
May 23.

[8]

ALLEN AND WIFE *v.* WOOD, ADMINISTRATOR OF
GRIMMETT.

(1 Bing. N. C. 8—13; S. C. 4 Moore & Scott, 510; 3 L. J. (N. S.) C. P. 219.)

Rents devised to a female *durante viduitate*, do not pass over to the remainder-man upon her cohabiting with one who, under an illegal marriage, holds himself out as her husband.

And the party who thus holds himself out, is not, by so doing, estopped from shewing the invalidity of the marriage.

THE plaintiff and his wife, who was the daughter of one Fuller, sought, by this action of money had and received, to recover the amount of certain rents and profits received by Grimmett, the intestate.

At the trial the plaintiffs put in the will of Fuller, by which he left these rents to his widow for life, provided she should continue unmarried, and, in case of her marrying again, they were to belong to his daughter, the plaintiff's wife.

The plaintiffs then proved that, about ten years ago, Mrs. Fuller had been ostensibly married to Grimmett, after banns of marriage published in her maiden name; that she had lived with Grimmett till her death, about two years ago, when he attended her funeral in the character of husband, and erected a monument to her memory, with an epitaph, in which he styled her his wife. The lady, however, had concealed the marriage, and as long as she lived, continued to receive the rents as the widow of Fuller.

TINDAL, Ch. J., before whom the cause was tried, considering, on the authority of *Rex v. Tibshelf* (1), that Mrs. Fuller and Grimmett had never been married, the plaintiff was nonsuited, with leave to move to set the nonsuit aside: accordingly,

Spankie, Serjt. obtained a rule *nisi* to that effect, on the ground that Grimmett, having held out Mrs. Fuller to the world as his wife, his representative was now estopped to say there

had been no legal marriage. *The intestate could not take advantage of his own wrong.

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WOOD,
[*9]

Wilde and Andrews, Serjts. shewed cause :

It was for the plaintiffs to establish their title to the rents by shewing that Mrs. Fuller had married again. That they failed to establish; and as the rents were received, not on the representation of a marriage between the parties, but by the suppression of any such fact, the intestate could not be said to take advantage of his own wrong. It was no more competent to the plaintiffs to rely on what they called a marriage in substance and effect, than it was for a defendant, in an action for a libel, to rely on shewing that, in substance and effect, the libel was true. In *Weaver v. Lloyd* (1), where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect, the jury having found that it was true in all particulars, except that the eye was not knocked out, it was held that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea.

Spankie :

The plaintiffs shewed a sufficient marriage within the meaning of the condition in Fuller's will, by shewing that the intestate held out Mrs. Fuller as his wife; and he having lived as in a state of marriage, his representative cannot now set up and take advantage of his turpitude and concubinage. A party who has conveyed property to give a colourable qualification, is not permitted to say he has not conveyed: *Doe v. Roberts* (2). So, in *Crocker v. Fothergill* (3) there was a demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under *the surface of other lands not demised; the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention mines at all; but the sheriff, in executing the writ of possession, by

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(1) 26 R. R. 515 (2 B. & C. 678).

(3) 21 R. R. 438 (2 B. & Ald. 652).

(2) 20 R. R. 477 (2 B. & Ald. 367).

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the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig: it was held, that although the latter could not be recovered under the declaration in ejectment, still that the tenant by his own act had estopped himself from taking that objection, and that in an action for the value of three years' improved rent, under the statute of 11 Geo. II. c. 19, the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig. And iniquity can no more be set up as a defence, than as a cause of action: *Montefiori v. Montefiori* (1).

At all events, the condition in Fuller's will applies as much to an intercourse like this as to a state of marriage; if he objected to marriage, he must have objected still more to concubinage as a *status* for his widow. In effect she was to enjoy the property only *dum sola et casta maneret*.

TINDAL, Ch. J.:

We may determine this question without infringing the general rule that a party shall not set up his own fraud or wrongful act as a ground of claim or defence. The plaintiffs here seek to recover certain rents and profits under a clause in the will of Fuller, by which he provides that property bequeathed to his widow shall go over to his daughter in case his widow shall take another husband. It is a part of the plaintiffs' case, therefore, not of the defendant's, to shew that Mrs. Fuller's right to the rents had determined. *But the plaintiffs' witnesses, after shewing that Grimmett and Mrs. Fuller had, indeed, lived together as man and wife, disclosed also, that that which was a marriage in form was no marriage in fact. It has been contended that, *primâ facie*, it was sufficient for the plaintiffs to shew that Grimmett and Mrs. Fuller were living together as man and wife: but, conceding that, it would have been open to the defendant to explain the real circumstances of the case; and if so, we could only have held, as was held in *Rex v. Tibshelf*, that this was no marriage. To

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invalidate a marriage under a false name, it is not necessary there should have been actual fraud. In all the cases cited in the note to *Rex v. Billingshurst* (1), the Judge took a wider view, and thought that where a false name has been inserted in the banns, though no fraud were intended, the marriage is without banns, and consequently illegal. As in *Wakefield v. Wakefield* (2), where Sir WILLIAM SCOTT stated and approved of that opinion; and in another case, of *Frankland v. Nicholson* (3), he said, "I do not hold it to be necessary that there should be actual fraud on the individual party; it is enough if the thing leads to a probability of fraud; and this mode of conducting the matter would lead to such consequences and mischief as it is the intention of the Legislature to prevent. It seems to me that courts of justice are only following up that intention in preventing such modes as are so obnoxious, and lead to fraud: certainly if this mode was permitted, a man might be married to the wife of another person without the slightest knowledge of the fact; and many instances might be put, in which a liberty of this kind would be extremely grievous." And in several other cases the same doctrine was held by that learned civilian. If, therefore, that which is *ipso jure* is *ipso facto* a void *marriage, how can it be a marriage which divests the right of the first devisee to the rents in question? The rule for setting aside the nonsuit must be discharged.

[*12]

PARK, J.:

This is an action to recover certain rents and profits bequeathed by Fuller to his widow, with a condition that in case she married again they should go over to her daughter. During her life the plaintiffs supposed she continued a widow; and unless they shew that she married a second time, they are not entitled to the rents. In order, however, to retain the property, Mrs. Fuller did that which does not amount to a marriage; and the plaintiffs, instead of shewing a marriage, have shewn that which is directly in the teeth of the statute and of all the decisions.

(1) 15 R. R. 474 (3 M. & S. 250).

(3) 15 R. R. 478 (3 M. & S. 259).

(2) 1 Phill. 139, 140, in note.

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The statute requires that the banns shall be published in the true names of the parties; here they were published under a fictitious name, which in effect is no publication at all; insomuch that a minister who should be privy to it would be liable to transportation. The statute goes on to enact that a marriage solemnised without publication of banns or licence shall be null and void to all intents and purposes whatever. Here the publication being in fictitious names, there was no marriage at all, and the circumstance came out in the plaintiffs' case.

The plaintiffs, therefore, have failed to establish any title to the rents in question, and the rule must be discharged. But this decision does not in any degree trench on the cases which decide that a man renders himself liable for the debts of a woman with whom he lives in concubinage.

GASELEE, J.:

The claim fails on the plaintiffs' own shewing.

BOSANQUET, J.:

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I am of the same opinion. In order to establish this claim, it was incumbent on the plaintiffs *to shew that Mrs. Fuller had married: but, as there was no marriage, the plaintiffs' title falls to the ground.

And as to the effect of any representations on the subject, Mrs. Fuller represented herself, not as married, but as still a widow. It has been urged that the testator's meaning was to include an intercourse, such as this, under the word "marriage." But we must apply that word in the will to a marriage according to the law of England, and not to a contract which the parties may dissolve at pleasure. That would be making the condition in the will a condition *dum sola et casta maneret*: a condition very different from the real one.

Rule discharged.

BAKER AND WIFE, EXECUTRIX OF HUTCHINS, *v.*
GOSTLING (1).

1884.
May 27.

[19]

(1 Bing. N. C. 19—28; S. C. 4 Moore & Scott, 539; 3 L. J. (N. S.) C. P. 292.)

A lessee for a term of years underleased for a term longer than his own, the under-lessee covenanting to pay rent to the lessee: Held, that the executor of the lessee might sue the under-lessee for rent accruing during the continuance of the lessee's term.

THE declaration stated, that John Hutchins deceased, in his lifetime, at the time of making the indenture thereafter mentioned, was lawfully possessed of a certain messuage or dwelling-house and tenement, situate at, &c., with the appurtenances, for the residue and remainder of a certain term of thirty-one years, commencing from the 25th of December, 1823, then to come and unexpired therein; and the said John Hutchins being so possessed thereof, by a certain indenture, made in his lifetime on the 17th of December, 1825, between *the said John Hutchins of the one part, and the defendant on the other part, the counterpart of which indenture, sealed with the seal of the defendant, the plaintiffs brought into Court, the date whereof was the same day and year last aforesaid, the said John Hutchins for and in consideration of the sum of 100*l.* to the said John Hutchins in hand paid, and also in consideration of the yearly sum of money, covenants, and agreements, thereafter mentioned and contained, by and on the part and behalf of the defendant, his executors, administrators, and assigns, to be paid, kept, done, and performed, assigned unto the defendant, his executors, administrators, and assigns, the said messuage or dwelling-house and tenement, situate and being as aforesaid, to have and to hold the said messuage and premises thereby assigned, and every part thereof (except as before excepted), unto the defendant, his executors, administrators, and assigns, from the 29th of September then last past, for and during the residue and remainder of the said term of years then to come and unexpired, yielding and paying therefore yearly and every year, during the said residue and remainder of the said term, unto the said John Hutchins, his executors and administrators, the yearly sum of

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(1) *Baynton v. Morgan* (1888) 21 Q. B. D. 101, 105; *affd.* 22 Q. B. Div. 74.—R. C.

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75*l.*, by equal quarterly payments, on the 25th of December, the 25th of March, the 24th of June, and the 29th of September, in every year, without any deduction or abatement whatsoever, the first payment to be made on the 25th of March, 1826. And the defendant did thereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said John Hutchins, his executors and administrators, amongst other things, that he, the defendant, his executors, administrators, and assigns, should and would pay unto the said John Hutchins, his executors and administrators, the said yearly sum of 75*l.*, in the proportions *and on the days thereinbefore appointed for payment thereof, without any deduction or abatement whatsoever. By virtue of which assignment, the defendant afterwards, to wit, on the said 17th of December, 1825, entered into and upon all and singular the said assigned premises with the appurtenances, and became and was possessed thereof, for the residue and remainder of the said term, so to him thereof assigned. The plaintiffs then averred, that after the making of the said indenture, and during the continuance of the term thereby assigned, and after the death of John Hutchins, to wit, on the 25th of December, 1833, a large sum of money, to wit, the sum of 243*l.* 15*s.* of the said yearly sum of 75*l.* in the indenture mentioned, for divers, to wit, thirteen of the said quarterly payments therein mentioned, according to the form and effect of the said indenture and of the said covenant of the defendant, became and was due and payable from the defendant to the plaintiffs James and Mary Baker, as executrix as aforesaid, and still was in arrear and unpaid, contrary to the form and effect of the said indenture and of the covenant of the defendant in that behalf. That the defendant, although often requested, had not kept his said covenant, so by him made with John Hutchins in his lifetime, but had broken the same; and to keep the same with the plaintiffs, James and Mary Baker, as executrix as aforesaid, had hitherto altogether refused, and still refused, to the damage of plaintiffs, James and Mary Baker, as executrix, of 300*l.*, and thereupon they brought their suit, &c. And brought into Court the letters testamentary of John Hutchins deceased, whereby it fully appeared that the said Mary

was executrix of the last will and testament of said John Hutchins deceased, and had execution thereof, &c.

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GOSTLING.

After setting out on *oyer* the deed declared on, the defendant pleaded that all the estate, interest, right, title, *term of years to come and unexpired, property, profit, claim, and demand whatsoever, which the said John Hutchins, at the time of making the supposed indenture in the declaration mentioned, or at any time afterwards, had of and in the premises with the appurtenances in the declaration mentioned, were derived by him under and by virtue of a certain indenture, made the 1st of August, 1824, between Sir Richard Sutton, of the one part, and John Hutchins of the other part, and sealed with the seal of the said Sir Richard Sutton: by which indenture Sir Richard Sutton demised and let to John Hutchins, all the premises with the appurtenances mentioned in the declaration, (except as therein excepted,) to have and to hold the same unto the said John Hutchins, his executors, administrators, and assigns, from the 25th of December then last past, for and during and unto the full end and term of thirty-one years from thence next ensuing, and fully to be complete and ended, at and under a certain yearly rent, to wit, the yearly rent of 35*l.* thereby reserved and made payable to the said Sir Richard Sutton: by virtue of which demise, the said John Hutchins, in his lifetime, afterwards and before the making the supposed indenture in the declaration mentioned, to wit, on the 1st of August, 1824, entered into and upon all and singular the said premises with the appurtenances so demised to him, and being the premises with the appurtenances in the declaration mentioned, and became and was possessed thereof for the term so to him thereof granted as aforesaid; and the said John Hutchins being so possessed thereof, he afterwards, and in his lifetime, and during the term granted by the said indenture of the 1st of August, 1824, to wit, on the 17th of December, 1825, by a certain indenture then and there made between him the said John Hutchins of the one part, and the defendant of the other part, and sealed with the seal of the said Hutchins,—[but *which said last-mentioned indenture, and the estate, term, and interest thereby demised and granted, after the making thereof, and long before the time of the

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commencement of this suit, and long before any part of the said supposed sum in the supposed indenture in the declaration mentioned became due, if the same or any part thereof ever did become due, to wit, on the 4th of November, 1830, to wit, at, &c. were bargained, sold, assigned, transferred, and set over by the defendant to one Thomas Smith, and the said indenture was then and there delivered by the defendant to the said Thomas Smith, and was then in the power, custody, or possession of the said Thomas Smith, so that the defendant could not produce or shew the same to the Court, and of this last-mentioned indenture, the supposed indenture in the declaration mentioned was the counterpart,]—under-demised and leased to the defendant, his executors, administrators, and assigns, all the premises with the appurtenances demised to him, the said John Hutchins, by Sir Richard Sutton, by the indenture of the 1st of August, 1824, except as therein excepted, to have and to hold the same to him the defendant, his executors, administrators, and assigns, from the 29th of September, 1825, for and during the term of thirty years from thence next ensuing, and fully to be complete and ended; yielding and paying therefore, yearly and every year during the said term thereby granted, unto said John Hutchins, his executors, administrators, or assigns, the yearly rent or sum of 75*l.* by equal quarterly payments. That the defendant did, in the said indenture of the 17th of December, 1825, covenant, promise, and agree, to and with the said John Hutchins, his executors, administrators, and assigns, amongst other things, that he, the defendant, his executors, administrators, and assigns, should and would well and truly pay to said John Hutchins, his executors, administrators, *or assigns, the said yearly rent or sum of 75*l.* on the days therein before mentioned for payment thereof, without any deduction or abatement whatsoever; but the said John Hutchins did not, by the last mentioned indenture or otherwise, reserve or retain to himself, or his executors, administrators, or assigns, or otherwise, nor had the said John Hutchins, at the time of his death, any reversion of or in the said premises or any part thereof. That the said indenture of the 17th of December, 1825, was the supposed assignment in the declaration mentioned; and that the said John Hutchins afterwards,

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and before any part of the supposed sum in the declaration mentioned, and which was the rent reserved and made payable by the indenture of the 17th of December, 1825, became due or payable, if any such ever did become due or payable, to wit, on, &c. at, &c. died : and so the defendant said that the plaintiff and the said Mary, as executrix, did not take or derive any estate, right, title, interest, term of years to come and unexpired, property, profit, claim, or demand whatsoever, of, in, or to the premises with the appurtenances, so under-demised and leased by the said John Hutchins to the defendant, and so being the premises in the declaration mentioned, or any benefit, power, or right to sue upon the said covenant of the defendant for payment of the said yearly rent or sum of 75*l.* reserved by the said last mentioned indenture ; or for the said sum of 243*l.* 15*s.* in the declaration mentioned, and thereby sued for, and which was stated and appeared in and by the declaration to have accrued due after the death of said John Hutchins : and that, the defendant was ready to verify, wherefore, &c.

Demurrer and joinder.

Stephen, Serjt. in support of the demurrer :

The point intended to be raised by the defendant is, *that the plaintiffs' testator, by having granted an under-lease for a term exceeding in length that for which he himself held the premises, parted with all transmissible interest ; that the covenant to pay rent is incident to the reversion ; and that no reversion remains in respect of which the plaintiffs can sue.

[*25]

But, though rent is incident to the reversion, it may also be separated from the reversion : Co. Litt. 93 a, 151 b ; and the defendant is liable on his express covenant, notwithstanding the testator might be without any reversion. The deed between him and the defendant amounts to an assignment of the testator's term : *Hicks v. Downing* (1) ; and where a lessee assigns his term, stipulating that the assignee shall render rent, the lessee may sue, although he cannot distrain for the rent : *Smith v. Mapleback* (2), Com. Dig. Debt, C. E., *Newcome v. Harvey* (3),

(1) 1 Ld. Ray. 99.

(2) 1 R. R. 247 (1 T. R. 441).

(3) Carth. 161, Ventr. 242, 2 Lev.

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Lloyd v. Langford (1), Bro. Abr. Dette, pl. 39, — *v. Cooper* (2). If the plaintiffs cannot sue, there is no other who has any claim; and it would be unjust that the defendant should occupy without payment. The rent accruing from a leasehold cannot go to the termor's heir.

Coleridge, Serjt. contrâ :

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What is the operation of the deed between the testator and the defendant is doubtful, and what the nature of the payment reserved. However, taking the sum reserved by the testator to be not a mere annual payment, as in *Smith v. Mapleback*, but from the periods of reservation and the nature of the premises occupied, to be clearly a rent, as such, it is subject to all the incidents of rent. Strictly speaking, rent cannot be demanded except by him who has the reversion; and though it appears from the cases which *have been cited, that a lessee who assigns, reserving rent, may sue his assignee for the same, yet that is only because the assignee is estopped to dispute the title of the party under whom he occupies. But that estoppel does not extend beyond his life; and in the present case the assignor being dead, the defendant is at liberty to shew that by his death all his interest in the premises ceased, and that there is no reversion in respect of which an action lies. The plaintiffs are in the condition of a stranger, to whom rent cannot be reserved: Litt. s. 346; and the circumstance that the heir cannot sue, affords no argument to shew that the plaintiffs can; for there are many cases in which rent becomes extinct, and the party originally liable ceases to be charged: *Thorn v. Woolcombe* (3).

Stephen :

In *Thorn v. Woolcombe* the term granted by the lessor had merged in the inheritance; and upon that account the rent incident to it was held to be extinguished. Here the term by virtue of which the defendant occupies is still subsisting. Rent service can only be recovered by the reversioner: but the rent sought to be recovered in this action is neither rent service nor rent seck; it is rent reserved by virtue of the defendant's covenant.

(1) 2 Mod. 175.
(2) 2 Wils. 375.

(3) 3 B. & Ad. 586.

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I think the plaintiffs are entitled to recover. This is an action of covenant, brought on an indenture entered into between the plaintiffs' testator and the defendant, by which certain premises held by the plaintiffs' testator for a term of thirty-one years from Christmas, 1823, were by him under-demised and leased to the defendant from the 29th of September, 1825, for thirty years, the defendant covenanting to pay *the lessor, his executors and administrators, the yearly rent or sum of 75*l.* by equal quarterly payments. It is contended, on the part of the defendant, that the plaintiff and his wife, as executrix of the lessor, are not entitled to recover during the continuance of the term. And, first, an objection is made that it is uncertain what is the operation of this deed. I think it amounts to a demise; and I need only refer to the case of *Poultney v. Holmes* (1), where the defendant having a term for years, whereof one year and three quarters was to come, agreed with the plaintiff that he should have the premises for the remainder of the term, paying to the defendant the same rent as was reserved upon the original lease; the plaintiff took possession, and then brought trespass against the defendant for a re-entry; it was objected that that amounted to an assignment of the lease, and was therefore void by the Statute of Frauds and Perjuries, not being in writing; to which it was answered, on the part of the plaintiff, that it must be taken as a lease, and not as an assignment, because the reservation was to the lessee, and not to the original lessor; and the lessee might maintain debt for rent upon it, though he could not distrain for want of a reversion; and Lord HARDWICKE, Ch. J., being of the same opinion, a verdict was found for the plaintiff.

Then, it is asked whether this is a covenant for the payment of a gross sum or for the payment of rent. Upon all the authorities, I consider it a payment in the nature of rent. The cases of *Newcome v. Harvey* (2) and *Lloyd v. Langford* (3), both referred to by Comyns (Debt, C. E.), shew that where the whole of a term is assigned, a gross sum reserved periodically to the assignor is a payment in the nature of rent. And if it were held

(1) Str. 405.

(3) 2 Mod. 175.

(2) Carth. 161.

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otherwise, great injustice might be occasioned, *as the tenant, if evicted, would have no answer to an action on his covenant for payment of the sum in question; whereas if it be considered as rent, eviction would be an answer to the lessor's claim. As to the case of *Thorn v. Woolcombe*, it amounts to no more than a decision, that when the term is merged in the inheritance, the rent reserved is extinguished: little more than had before been decided in *Webb v. Russell* (1), which excited so much attention at the time, but which has long been recognised as undoubted law. It is a fallacy to say the plaintiffs sue as assignees of the reversion; they sue on privity of contract; and the contract is one on which they are entitled to recover.

PARK, J. and GASELEE, J. concurred.

BOSANQUET, J.:

I am of the same opinion. There is no merger of a term here, but a demise from Hutchins to the defendant, with a reservation of a payment in the nature of rent; and the question is, whether the plaintiff and his wife, as executrix of Hutchins, are entitled to sue on a covenant by which the defendant has engaged to pay the rent or yearly sum of 75*l*. The term being still in existence, I am of opinion they are entitled to sue. They do not sue as assignees of the reversion, but as personal representatives of the testator. They claim the benefit of privity of contract, and towards the defendant stand in the same situation as the testator if he had lived. Our judgment, therefore, must be for the plaintiffs.

Judgment for plaintiffs.

1834.
May 28.
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W. P. AND R. M'ANDREW v. ADAMS (2).

(1 Bing. N. C. 29—45; S. C. 4 Moore & Scott, 517; 3 L. J. (N. S.) C. P. 236.)

Defendant, by charter-party of October 20th, 1832, agreed to go in ballast from Portsmouth to St. Michael's, and bring back a cargo of fruit direct to London. The charterer was to be allowed thirty-five running days for loading and unloading, to commence on the 1st of December then next; and if the vessel did not arrive at St. Michael's

(1) 1 B. R. 725 (3 T. R. 393). v. *Garrett*, 31 R. R. 524.—R. C.
(2) See cases cited in note to *Davis*

by the 31st of January, 1833, the charterer was to be at liberty to rescind the charter-party: Held, that the defendant was bound to proceed at once to St. Michael's, and was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at St. Michael's before the 31st of January, 1833.

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THE first count of the declaration stated, that on the 20th of October, 1832, to wit, at, &c., by a certain charter-party of affreightment then and there made between the defendant, master of the good ship or vessel called the *Swallow*, then lying at Portsmouth, and the plaintiffs as affreighters of the said vessel, it was mutually agreed between the plaintiffs and the defendant, that the said vessel being tight, staunch, and strong, and every way fitted for the voyage, should proceed in ballast to the island of St. Michael's, or so near thereunto as she might safely get, and after being well and sufficiently ballasted with stone or iron, and not with sand or anything that might be prejudicial to the cargo, should receive on board from the agents of the affreighters a full and complete cargo of fruit in boxes, which the affreighters bound themselves to ship, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, stores, and furniture; and the vessel having been so loaded, should proceed with the said cargo direct to the port of London, or so near thereunto as she might safely get, and should there deliver the same: the master should not put into any port with the vessel on her homeward passage, unless compelled by stress of weather or other unavoidable necessity; (restraint of princes and rulers, the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the *said voyage, always excepted): the freight which should be paid for the said cargo should be 7l. 10s. per ton, together with ten guineas as a gratuity to the master, for his care and attention to the cargo, according to the clauses and stipulations therein expressed for that purpose: and for the purpose of loading and unloading the said vessel, the affreighters or their agents should be allowed the space of thirty-five running days in the whole, if required; those days should commence on the 1st of December then next, provided the said vessel had then

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arrived at St. Michael's and should be in readiness to receive her cargo; (notice thereof being given to the shipper); should continue until she was laden and despatched from her loading port; recommence at her port of discharge on the day after her report at the custom-house and being ready to unload, and should finally cease on her being fully discharged of her cargo: the affreighters or their agents should also be allowed to keep the said vessel on demurrage for the space of ten running days, over and above the days already thereinbefore allowed for loading and discharging, on paying for the same at and after the rate of 3*l.* per day. And it was further agreed, that in case the said vessel should not be arrived at St. Michael's and in readiness to receive her cargo on or before the 31st of January then next, it should be optional with the agents of the affreighters, whether they should load her or not; and in case they declined loading her, the charter-party should be null and void. (The penalty for the non-performance of the charter-party was 300*l.*) And the charter-party being so made as aforesaid, afterwards, to wit, on, &c. at, &c. in consideration thereof, and that the plaintiffs, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to fulfil and perform the charter-party, as affreighters

[*31] of the said ship or vessel in all things on their part and behalf to be performed and fulfilled, the defendant undertook and then and there faithfully promised the plaintiffs, to perform and fulfil the charter-party of affreightment, in all things on his part and behalf, as such master of the said ship or vessel as aforesaid, to be performed and fulfilled. But although the plaintiffs had always performed and fulfilled all things in the charter-party mentioned, on their part and behalves to be performed and fulfilled, to wit, at, &c.; and although on the arrival of the ship or vessel at St. Michael's aforesaid, they always were ready and willing to have loaded in and on board the said ship or vessel a full and complete cargo of fruit in boxes; and although they had been always ready to pay freight according to the charter-party; and although it was the duty of the master, in pursuance of the charter-party, to have sailed and proceeded with the said ship or vessel from Portsmouth without any unnecessary deviation; yet

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the defendant, not regarding the charter-party, nor his promise and undertaking, nor his duty in that behalf, but intending to injure the plaintiffs in that behalf, did not nor would, although not prevented by the restraint of rulers or princes, or any other of the matters or things excepted as aforesaid, after the making of the charter-party, sail from Portsmouth aforesaid, with the said ship, and in ballast, to the island of St. Michael's without making any unnecessary deviation therefrom; but on the contrary thereof, after the making of the said charter-party, to wit, on, &c., at, &c., did set sail with and carry the said ship or vessel towards Oporto, and on arriving near to Oporto, did unnecessarily and improperly sail and proceed back again to Portsmouth aforesaid; and thereby did make an unnecessary deviation out of the voyage from Portsmouth to the island of St. Michael's in the charter-party mentioned, whereby the ship did not arrive at St. Michael's until a long period of time after that at *which she might have arrived there but for such unnecessary deviation aforesaid. By means of which said premises the ship did not reach the port of London with a certain cargo of fruit in boxes, which the plaintiffs caused to be shipped in and on board the said ship or vessel, on her arrival at St. Michael's, until a long time, to wit, two months after she ought in due course to have arrived if she had sailed without unnecessary deviation to St. Michael's, according to the true intent and meaning of the said charter-party. By reason whereof the said cargo so loaded on board the said ship or vessel was of much less value than it might and otherwise would have been if the defendant had performed the voyage without such deviation as aforesaid. And thereby the plaintiffs lost divers large sums of money, to wit, the sum of 300*l.*; and also the plaintiffs, by reason of the delay in the arrival of the ship or vessel as aforesaid, were forced and obliged to pay, and actually paid, to certain persons, to wit, to Messrs. Bayliss & Co., and Messrs. Webb and Pilcher, to whom the plaintiffs had sold the cargo, divers large sums of money, to wit, the sum of 260*l.*, to wit, at, &c.

The defendant pleaded the general issue.

At the trial before Tindal, Ch. J. it appeared, that on the 20th of October, 1832, the plaintiffs chartered the defendant's vessel,

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the *Swallow*, then lying at Portsmouth, to proceed in ballast to St. Michael's, there to take on board a cargo of fruit, and return direct to London. For the purpose of loading and unloading, the freighters were to be allowed thirty-five running days in the whole, if required, to commence on the 1st of December then next, provided the vessel should then have arrived at St. Michael's, and be in readiness to receive her cargo. The freighters were also to be allowed to keep the vessel ten running days more on demurrage; and if she should not be at St. Michael's ready to receive her cargo by the 31st of January, then *next, it was to be optional with the freighters to load or not, and to declare the charter-party null and void.

The usual length of the voyage from England to St. Michael's is a fortnight or three weeks, and the time consumed in loading and unloading, about a week; so that, if the defendant had sailed direct for St. Michael's about the time he executed the charter-party, it might reasonably be expected that he would have delivered his cargo in London by the 1st of January, 1833. Instead, however, of proceeding in ballast direct for St. Michael's, the defendant, on the 7th of November, sailed to Oporto, with troops for Don Pedro, intending to proceed to St. Michael's after landing the troops. Being prevented from effecting his purpose by Don Miguel's batteries, he returned to Portsmouth on the 28th of November, relanded the troops, and sailed for St. Michael's on the 6th of December. He arrived at that island before the 31st of January, was loaded with oranges, and arrived in London on the 1st of February. By that time there was a glut of oranges in the market, and the price had fallen, since the end of December (when the season of the London market begins), 10s. 6d. a box, which, upon the whole of the *Swallow's* cargo, occasioned a loss of more than 260*l*.

On the 9th of November, the plaintiffs, being informed that the defendant had sailed for Oporto, despatched a letter for him to St. Michael's, in which they said, "In having taken the *Swallow* to Oporto with passengers, on her way to St. Michael's, instead of proceeding direct, we consider you to have deviated from the due performance of the charter-party entered into with us, and we hold you liable for all loss or injury which may

arise to the parties interested in consequence of your not proceeding direct.”

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The plaintiffs were agents for Brander, an orange merchant at St. Michael's, and in November, subsequently to their addressing to the defendant the letter of the 9th of that month complaining of his deviating to Oporto, they, on the part of Brander, contracted to let Bayliss (with whom they had negotiated on the 20th of October) have 335 boxes of Brander's oranges by the *Swallow*, and Webb and Pilcher 150 boxes, at the market price at St. Michael's. The oranges were received by Bayliss and Webb and Pilcher, who paid Brander for them.

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In the fruit trade, the early ships sail about the end of October, and arrive in London about the end of December: it is advantageous to be early in the market, and Bayliss and Webb and Pilcher, having been led to expect that the *Swallow* would arrive early, called on the plaintiffs to make good the loss incurred by the fall in the price of oranges in the London market, between the end of December and the 1st of February. The plaintiffs paid them the difference, amounting, as above, to upwards of 260*l.*, and sought by this action to recover corresponding damages at the hands of the defendant.

A verdict was taken for 254*l.*, with leave for the defendant to move to enter a nonsuit, in case the Court should be of opinion that the stipulations of the charter-party were satisfied by his arriving at St. Michael's before the 31st of January, 1833, or to reduce the verdict to nominal damages, if it should be thought the plaintiffs were not responsible to Bayliss and Webb and Pilcher.

Wilde, Serjt. having obtained a rule *nisi* accordingly,

Spankie, Serjt. and *Watson* shewed cause :

1st. The stipulations of the charter-party were not satisfied by the defendant's arriving at St. Michael's just before the 31st of January. If he did not arrive by that time, the plaintiffs had the option of rescinding the contract: *Shubrich v. Salmond* (1) : but their intention, *and his contract, was, that he should

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(1) 3 Burr. 1637.

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proceed without delay and without deviation. This might be inferred from the nature of the trade, in which great advantage is derived from being early in the market; but it is in effect expressly provided for by the stipulation, that the defendant should proceed out in ballast. The obvious meaning of that stipulation is, that he should not lose time by engaging in any other adventure, or lessen the speed of his vessel outwards by any kind of load. And, even without such stipulation, it is the duty of the captain, upon such a contract as this, to proceed on his voyage without deviation and without delay. Thus, in *Davis v. Garrett* (1), where the plaintiff put on board defendant's barge, lime, to be conveyed from the Medway to London, the master of the barge deviated unnecessarily from the usual course, and, during the deviation, a tempest wetted the lime, and the barge taking fire thereby, the whole was lost; it was held, that the defendant was liable. The same principle is established by *Max v. Roberts* (2). So in *Freeman v. Taylor* (3), the plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the Cape, and having delivered goods there, to proceed with all convenient speed to Bombay, where the freighter engaged to put on board a cargo of cotton for England. Plaintiff arrived at the Cape, and might have proceeded on his voyage in two days; but he remained there ten, taking in cattle for the Mauritius on his own account: he went round by the Mauritius on his way to Bombay, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct: other ships had arrived in the meantime: the freighter refused to load; and, in an action on the charter-party, the jury were directed to consider whether the deviation *was such as to have deprived the freighter of the benefit of the contract; and, a verdict being found for the defendant, a new trial was refused. And in *Mount v. Larkins* (4), where the defendant executed, 28th of February, 1824, a policy of assurance on freight from Sincapore to Europe, with liberty to sail to, touch, and stay at, any places whatsoever, to load, unload, reload, and for all necessary purposes whatever; the ship sailed from London in September, 1823; and, having

[*36]

(1) 31 R. R. 524 (6 Bing. 716).

(2) 12 East, 89.

(3) 34 R. R. 647 (8 Bing. 124).

(4) 34 R. R. 631 (8 Bing. 108).

been detained by the captain, for his own purposes, at Van Diemen's Land, did not arrive at Singapore till the 30th of March, 1825; she sailed thence on the voyage the 3rd of May, 1825: it was held, that, by so long a postponement of the risk, the defendant was discharged, a jury having found the delay unreasonable.

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The captain must be taken to know the custom of the trade, and the importance of an early arrival in the market: *Vallance v. Dewar* (1).

2ndly. The plaintiffs are entitled to retain their verdict for the whole amount. It is true that the cargo was consigned to Bayliiss and Webb and Pilcher; but the plaintiffs were impliedly responsible to them for the vessel's early arrival in the market, and for the consequences of her delay. Even as agents or trustees for them, or as consignors, they had such a special property in the cargo as would entitle them to recover damages in trover against the defendant for loss by improper detention; and, on the same principle, they ought to recover for loss occasioned by the defendant's delay. In *Moore v. Wilson* (2) it was held, that the consignor might recover against a carrier for non-delivery, although the charge for carriage was to be paid by the consignee: *Davis v. James* (3), *Freeman v. Birch* (4).

Wilde:

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The fruit market continues in London for some months; and though an early arrival may sometimes be advantageous, there is nothing on the face of this charter-party to shew that an early arrival was intended or desired by the plaintiffs. On the contrary, the stipulation, that the plaintiffs might rescind the contract if the defendant did not arrive at St. Michael's by the 31st of January, leads to the inference that the defendant's engagement would be satisfied if he arrived by that day. If the plaintiffs had desired an earlier voyage, they would have inserted an earlier day in that stipulation: and the time allowed for running days and demurrage leads to the same conclusion. In

(1) 10 R. R. 738 (1 Camp. 503).

(4) 38 R. R. 388 (1 Nev. & Man.

(2) 1 R. R. 347 (1 T. R. 659).

420).

(3) 5 Burr. 2680.

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ADAMS, *Max v. Roberts, Davis v. Garrett, Freeman v. Taylor, and Mount v. Larkins*, the time for the voyage was not defined by any such specification of a particular day beyond which the shipowner was to have no claim; and deviation or unreasonable delay expressly appeared. Here, the captain arrived within the specified time; and, provided he accomplished that, he had a right in the interval to employ his vessel as he pleased. With respect to the custom of the trade, he was bound to know the course of the voyage as to stowing and navigating his vessel; but the rise or fall of price in the London market is a matter out of his department. Having arrived before the last day stipulated by the plaintiffs, he must be deemed to have arrived within a reasonable time.

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But, at all events, the plaintiffs are entitled only to nominal damages. The loss occasioned by the fall in the market fell, in the first instance, upon Bayliss and Webb and Pilcher, the consignees of the cargo; and the plaintiffs, having entered into no agreement that the cargo should arrive within any given time, were under no obligation to reimburse the consignees. The contract for the sale of the oranges to Bayliss and Webb and Pilcher was not entered into till after the plaintiffs knew *the defendant had sailed for Oporto. They could not, therefore, at the time of that contract, have engaged with Bayliss and Webb and Pilcher that the *Swallow* should sail direct to St. Michael's.

TINDAL, Ch. J. :

This case comes before the Court on two distinct grounds. The first, on a motion to enter a nonsuit; the other, that the verdict for 254*l.* be reduced to nominal damages.

We think that the verdict ought to stand, but that it should be reduced to nominal damages.

The broad question is, whether, upon the construction of the charter-party, there has been unnecessary delay in commencing the voyage to St. Michael's.

Upon general principles, in all contracts by charter-party, where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay

in commencing the voyage; and, after it has been commenced, no deviation.

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And the question here is, whether the defendant sailed within a reasonable time according to the terms of his charter-party. All the authorities concur in stating, that the voyage must be commenced within a reasonable time; and they are all cited and commented upon in *Freeman v. Taylor* and *Mount v. Larkins*. If that be the general rule, where there is any delay in a voyage it is incumbent on the party to account for it. In many cases it may be difficult to say what is a reasonable or an unreasonable time for commencing a voyage. It is better, therefore, to refer to the contract itself, and see whether the voyage performed is conformable to that pointed out by the contract.

Now, looking at this contract, I think, with a view to the object of the voyage, its commencement was delayed an unreasonable time.

The charter-party was entered into the 20th of October, 1832, and provides, that the *Swallow*, "being tight, *staunch, strong, and in every way fitted for the voyage, shall proceed in ballast to St. Michael's."

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I do not lay stress on the stipulation for proceeding in ballast, any further than that it seems to refer to a voyage in which the master should not lie by to take in a cargo, which might delay the ship on her voyage. The instrument then goes on,—“shall there receive on board a complete cargo of fruit; and, having been so loaded, shall proceed with the said cargo direct to the port of London.” Then, after some stipulations, to which it is unnecessary to refer,—“for the purpose of loading and unloading, the affreighters or their agents shall be allowed the space of thirty-five running days, if required, to commence on the 1st of December, provided the vessel should then have arrived at St. Michael's, and be allowed to keep the vessel on demurrage ten days over and above the running days.”

Now, inasmuch as the parties have stipulated that the lay days shall commence on the 1st of December, it may be inferred that they contemplated the voyage to St. Michael's should terminate by that day. If, indeed, by any accident or unforeseen cause, which should excuse the master, the vessel should arrive later,

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the charterer would have no just cause of action: but the intention at the time was, that the object of the voyage should, if possible, take effect from the 1st of December. That it might have taken effect from that time, is clear; for the voyage usually lasts a fortnight or three weeks, and the vessel sailed for Oporto on the 7th of November.

The instrument then goes on, "That, in case the vessel should not be arrived at St. Michael's, and in readiness to receive her cargo by the 31st of January next, it shall be optional with the agents of the affreighters whether they load or not; and in case they decline loading, the charter-party shall be null and void."

[*40] That was to give the charterer the option of repudiating *the contract if the vessel should arrive too late for any useful purpose, although, if she had been detained by any justifiable cause, he might have no right of action against the owner.

And all the evidence in the cause goes to shew that the intention of the parties in entering into this contract was such as I have described: the course of the trade in London, which requires a speedy voyage, and gives advantages to those who are first in the market; and the letter of the 9th of November, in which the plaintiffs say, "In having taken the *Swallow* to Oporto with passengers, on her way to St. Michael's, instead of proceeding direct, we consider you to have deviated from the due performance of the charter-party entered into with us, and we hold you liable for all loss or injury which may arise to the parties interested in consequence of your not proceeding direct."

I think, therefore, that, as the commencement of the voyage was, without any justifiable cause, delayed till the 6th of December, an action lies for the plaintiffs.

As to the second point, if the charter-party has been broken, although the plaintiffs may have incurred no actual damage, the law gives them nominal damages. But the plaintiffs allege special damage, and it is for them to make out that allegation. They state in the declaration, "that thereby the plaintiffs lost divers large sums, to wit, the sum of 300*l.*; and also the plaintiffs, by reason of the delay in the arrival of the ship or vessel as aforesaid, were forced and obliged to pay, and did actually pay, to certain persons, to wit, Messrs. Bayliss & Co.,

and Messrs. Webb and Pilcher, to whom the plaintiffs had sold the cargo, divers large sums of money, to wit, the sum of 260*l*."

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Looking at the evidence, it does not appear that any such contract was entered into by the M'Andrews, as agents of Brander, with Webb and Pilcher, and with *Bayliss, as should entitle the latter to sue the M'Andrews; or that any cargo of theirs has been kept back for the delay of which M'Andrews are responsible to them. The damages, therefore, must be reduced to 1*s*.

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PARK, J. :

In all contracts by charter-party expedition is of importance, for, by delay, the whole object of the voyage may be defeated: but expedition appears to be peculiarly of importance in the trade in which the plaintiffs are engaged; and Lord TENTERDEN lays it down, in his work on Shipping, that the intention of the parties is to be looked to with reference to the trade in which they are engaged. Looking at this charter-party, I entertain no doubt as to the intention of the parties, that the voyage should be commenced with all reasonable expedition; and the law in our books, on this point, is the same as with foreign nations.

Emérigon (c. 13, s. 10) discusses the lawfulness of undertaking another voyage pending an insurance. After citing two old cases, in which it had been decided by the French Courts that such voyage might lawfully be undertaken, he observes: "Mais cette jurisprudence était contraire au principe établi dans la précédente section, et à la doctrine de tous nos auteurs, qui nous apprennent que si, avant que le voyage assuré soit commencé, le capitaine en entreprenne un autre, l'assurance est nulle, et la prime doit être restituée." This was cited in *Mount v. Larkins*, where the judgment turned on the same general principles; and the same law was laid down in *Freeman v. Taylor*. There, the plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the Cape, and, having delivered goods there, to proceed with all convenient speed to Bombay, where the freighter engaged to put on board a cargo of cotton for England. Plaintiff arrived at the *Cape, and might have proceeded on his voyage in two days; but he remained there

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ten, taking in cattle for the Mauritius on his own account. He went round by the Mauritius in his way to Bombay, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct: other ships had arrived in the meantime. The freighter refused to load; and, in an action on the charter-party, the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract; and a verdict being found for the defendant, the Court refused to grant a new trial.

So, in *Palmer v. Marshall* (1), TINDAL, Ch. J. said, "The policy bore date the 28th of January, 1831, and the vessel remained in the float at Bristol from the date of the policy till the 17th of May, when she sailed on her voyage, and was shortly afterwards lost. A policy effected in these terms, and in this shape, implies that the voyage insured shall be very shortly commenced, or is, at all events, in the near contemplation of the parties; and when we see that, in the present instance, the voyage was not commenced till the middle of May, we are bound to say that the delay was unreasonable, unless it be accounted for." And ALDERSON, J. said, "A delay in sailing, in order to be justified, must be a delay incurred for the purpose of the voyage." And there was no reason why this vessel, when the defendant had entered into the charter-party on the 20th of October, should take an intermediate voyage with troops for Don Pedro.

But the strongest case is *Davis v. Garrett*, where TINDAL, Ch. J. says, "We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship, or hired for the special purpose of the *voyage, to proceed without unnecessary deviation in the usual and customary course."

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And it is not usual or customary to touch at Oporto in the voyage to St. Michael's. The whole of the evidence shews, that, though some persons may speculate for cargoes at the close of the season, an early and expeditious voyage to St. Michael's gives the merchant an advantage in the market. The number of running days was probably appointed with a view to any accident that might detain the vessel; and the word "direct," applied to the homeward voyage, does not imply that the master was to be

at liberty to deviate on the outward voyage. On this contract, therefore, it seems to me clearly the intention of the parties that the vessel should sail for her destination immediately; and the letter of the 9th of November is highly confirmatory of this. With respect to the damages, I at first entertained some doubt; but, as it is admitted that, to entitle the plaintiffs to sue the defendant, Webb and Pilcher should be in a situation to have sued the plaintiffs, and as there appears to be no contract on which they could have proceeded, I yield to the opinion of the rest of the Court.

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GASELEE, J. :

The first point has been so fully discussed that I shall add no more. There is nothing to take this case out of the general principle so frequently laid down, and particularly relied on in *Davis v. Garrett*.

As to the damages, it is agreed that, before the plaintiffs can recover against the defendant, they must make out that they were themselves liable to the suit of Webb and Pilcher. That, they have failed to establish; and though Bayliss began to negotiate on the 20th of October, he came to no agreement till near the end of November, a *fortnight after the plaintiffs had complained that the defendant had broken the terms of his charter-party; and, even in that transaction, the plaintiffs appear to have acted rather as agent of Brander than on their own account. Nor was the contract with Webb and Pilcher entered into before the 23rd of November. I think, therefore, on these grounds, the damages must be reduced.

[*44]

BOSANQUET, J. :

I am of the same opinion on both points. The general principle is, that he who enters into a contract is bound to perform it within a reasonable time, unless there be provision to the contrary; and I see nothing in this contract to control the general principle. The vessel is to proceed to St. Michael's in ballast; which shews that it was wished she should not be impeded by engaging in other traffic. The lay days are to commence from the 1st of December; which shews the time of

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arrival in the contemplation of the parties ; and the charterer is to have the option of being off his bargain if the vessel does not arrive out by the 31st of January. That is a stipulation inserted on his behalf to quicken the owner, but does not absolve the owner from using all reasonable expedition. Then, the contract is executed on the 20th of October, and the vessel sails on the 7th of November ; which, under ordinary circumstances, would have brought her to St. Michael's by the 1st of December. But the captain takes in troops and sails for Oporto, which delays him till the 6th of December ; so that the plaintiffs have lost the chance of advantage they would have derived from the vessel's early arrival in the market. I consider this clearly a breach of the charter-party, for which an action lies. Then comes the question, what damages they are entitled to. Now, the *plaintiffs were not principals, but entered into the charter-party for the benefit of others who might ship a cargo ; they therefore, personally, have sustained no loss ; but if they have entered into any contract by which they have bound themselves to deliver goods by a certain time, and have paid damages upon failing to do so, they may call on the defendant to make good such loss. However, they do not appear to have been placed in any such circumstances. The contract with Bayliss was not entered into till after they had complained of a breach of contract on the part of the defendant.

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The plaintiffs, therefore, are entitled to retain their verdict, but only for nominal damages.

Rule absolute to reduce the verdict to nominal damages.

COOPER *v.* BLANDY AND ANOTHER.

(1 Bing. N. C. 45—53; S. C. 4 Moore & Scott, 562; 3 L. J. (N. S.) C. P. 274.)

1834.
May 30.

[45]

The plaintiff came into occupation under one who had paid rent upon distress by the defendant: Held, that after proof of this fact, the plaintiff was estopped from disputing the defendant's title to the rent, notwithstanding the defendant inadvertently put in evidence a document which shewed that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger.

REPLEVIN. The defendant Blandy avowed for two years and a half rent, due from the plaintiff as tenant to Blandy, under a demise of the premises at 60*l.* a year.

The defendants also made cognizance as bailiffs of James Temple Mansel;

And the plaintiff pleaded *non tenuit*.

At the trial it appeared that the plaintiff had obtained possession of the premises (the "Three Tuns" tavern in Fetter Lane) from Nightingale, the preceding occupier, *and had taken Nightingale's stock; that Nightingale succeeded one Perry, and Perry one Nelson.

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The defendants proved that Perry had paid rent to Blandy under a distress in February, 1829, and Nightingale in February, 1831.

The defendants then put in evidence a deed of October, 1809, by which James Temple Mansel and his wife demised the premises to Nelson for thirty-one years.

It appeared, however, that, in 1809 and previously, the legal interest in the premises was in Alexander and Barclay, the trustees under Mr. and Mrs. Mansel's marriage settlement; and that Alexander, as agent for the Mansels, had often received the rent from Nelson.

Mansel and his wife died in 1825; and in April, 1826, under a decree of the MASTER OF THE ROLLS, Alexander and Barclay conveyed the fee simple in the premises to the defendant Blandy, to whom Mansel and his wife were largely indebted.

The jury having found a verdict for the defendants,

Atcherley, Serjt., pursuant to leave given at the trial, moved to set it aside and enter a verdict for the plaintiff, on the ground that the defendants, after shewing that the plaintiff occupied

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the premises by virtue of the lease granted by Mansel and wife in 1809, ought, in order to justify a distress for rent, to have gone on and have shewn a conveyance of the reversion from Mansel and wife to the defendant Blandy.

Merewether, Serjt. shewed cause:

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The plaintiff, having come in under Perry and Nightingale, must stand in the same situation with respect to title as his predecessors. Now Perry, in 1829, and Nightingale in 1831, submitted to pay rent under a distress made by Blandy: after payment under such circumstances they *were estopped to dispute Blandy's title; and therefore the plaintiff, claiming under them, is estopped also. Where the lessor's estate has expired, and the lessee is exposed to another claimant, he may, in some cases, set up those facts against the lessor's claim: *Rogers v. Pitcher* (1). But, here, there is no other claimant, nor any evidence that Blandy's interest has expired. In *Rennie v. Robinson* (2), where A. hired apartments by the year of B., B. afterwards let the entire house to C., who sued A. in an action of use and occupation for the hire of the apartments, it was held that A. could not impeach C.'s title; and *Doe v. Parker* (3) is to the same effect.

Atcherley and *Kelly* in support of the rule:

The plaintiff and his predecessors, Perry and Nightingale, stand in the situation of Nelson, the original lessee under the lease of 1809, from whom they claim. And, as Nelson would have been estopped to dispute the title of Mansel and wife, the lessors in that lease, or of any who claim under Mansel and wife, so is the plaintiff. But the rule of estoppel goes no further: they may dispute the title of a stranger; and, upon the evidence in this case, the avowant is a stranger to Mansel and wife. The payment of rent is only *primâ facie* evidence of admission of title, which may afterwards be rebutted by the parties shewing it was paid under a mistake. And, even if it should be thought that, after such payments, the plaintiff was

(1) 6 Taunt. 202.

(3) Peake's Evid. 283, 5th edit.

(2) 25 R. R. 604 (1 Bing. 147).

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estopped to produce evidence infirmatory of the avowant's title, yet, when the avowant has himself shewn, by the deeds he has given in evidence, that he has no title to distrain, the plaintiff may take advantage of what appears on the *avowant's own shewing. Here the avowant has shewn that the plaintiff occupied the premises by virtue of a lease from Mansel and wife; and he has shewn no conveyance of the reversion from Mansel and wife to himself, no confirmation of the lease, nor any attornment by the plaintiff. Upon his own shewing, therefore, he has no title to distrain; and, being destitute of such title, he falls within the rule established in *Rogers v. Pitcher*.

In *Fenner v. Duplock* (1) it was held, that payment of rent by a lessee to a lessor after the lessor's title had expired, and after the lessee had notice of an adverse claim, did not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless, at the time of payment, the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired.

TINDAL, Ch. J.:

I am unable to perceive any sufficient ground for exempting this case from the ordinary rule which prevails between landlord and tenant, namely, that, where a party has enjoyed land, he is estopped to dispute his landlord's title. Here, the plaintiff occupied the premises in question from 1831 to 1833. The avowant distrains and avows for two years and a half's rent; and all he is bound to prove under the avowry is, that the plaintiff was actually tenant at a certain rent, and that the rent was in arrear. It is immaterial whether the plaintiff occupied under a lease, or as a tenant from year to year. At the trial the defendant might have confined himself to the fact, that two persons, Nightingale and Perry, had occupied the premises from 1827 to 1830, and had paid rent to him, 60*l.* a year by quarterly payments. Then, upon proving that the plaintiff came in under Nightingale and Perry, the law would have implied a tenancy from year to year. Had *he confined his proof to those facts, the payment of rent to

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(1) 27 B. R. 537 (2 Bing. 10).

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Nightingale and Perry under a distress would have been such an acknowledgment of the defendant's title, as would have precluded the plaintiff, coming in under Nightingale and Perry, from raising any dispute. But because the defendant went further, and unnecessarily put in evidence the deed of 1809, it is contended that he has himself shewn he is not entitled to the rent. That deed is a lease made by Mansel and wife, by which they demise the premises to Nelson, to hold for thirty-one years; and it is urged that the rent paid by Nightingale and Perry, was paid in affirmance of that lease, and that the tenants may now say to their landlord, "We require you to go on and shew a conveyance of the reversion to yourself." Why is that necessary? Nightingale and Perry have already admitted the defendant's title as landlord. If they apprehended a claim from any other quarter, why did they not dispute his title when he levied a distress for rent? Their abstaining from dispute at that time, is an admission that he had a right to the rent; and why are we to presume, in favour of one who has admitted the landlord's title by payment of rent under a distress, that the landlord is not entitled to receive it?

Whether or not such a payment is in all cases, and at all events, an estoppel which precludes the occupier from shewing that some other person is entitled, we need not decide here. In *Rogers v. Pitcher* it was held, that under some circumstances it may not be an estoppel. But it is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called upon to say he has none. Before calling on us to come to any such conclusion, the plaintiff should at least shew that he paid the rent to the defendant by mistake, and that *some other person is entitled to receive it. So far from that, there was every reason for supposing that the right to distrain was with the defendant. He had purchased the property, and under that purchase he might be in possession of some other deed, which, under the circumstances, he was not bound to produce at the trial. And the evidence shewed, either that the plaintiff was dealing with the defendant as purchaser in fee of the property, or that the lease

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of 1809 was made by persons who had no right to grant it, and then Nightingale and Perry, in whose place the plaintiff stood, were only tenants from year to year.

Here, therefore, we have a person who has enjoyed the land ; whose predecessors have admitted the landlord's title ; but who, when called upon to pay rent, says, " Because the landlord has put in evidence a deed which raises a doubt, but does not necessarily militate with a right to distrain, I ought to be exempted from the payment of rent." He cannot be permitted to exonerate himself by such an argument, and therefore the rule must be discharged.

PARK, J. :

The argument at the Bar turns on the fallacy of assuming that the rule of law which precludes a tenant from disputing his landlord's title is an exception to the general principle under which the actor in a cause is required to establish his claim ; whereas it is itself a general rule, to which the cases cited, as *Rogers v. Pitcher*, *Fenner v. Duplock* and others, are cases of exception. In those cases, the title of the lessor had expired, and other persons were entitled to the rent. Here, the rent has been paid constantly to the same person, and no other has put in any claim. It is a bare case of a tenant who has paid rent to the only person who claims to be landlord. Nightingale and Perry never paid to any but the defendant, and the plaintiff stands in the same situation as Nightingale and *Perry. The defendant introduced the deed of 1809 unnecessarily : he might have rested his case with the payments by Nightingale and Perry, and the assignments to the plaintiff. Then, *Panton v. Jones* (1) is in point. There, the defendant had never paid rent personally to the plaintiff, and she did not give strict evidence of title ; but it was proved, that in January, 1811, the defendant being in possession of the premises, she distrained on his goods for 39*l.* 18*s.*, stated to be arrears of rent then due from him to her as his landlady. He did not replevy, and the goods were sold to satisfy the rent. It was contended on behalf of the defendant, that payment under the distress was no acknowledgment of a tenancy by the party submitting to it.

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(1) 14 R. R. 757 (3 Camp. 372).

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But BAYLEY, J. said, "I have no doubt that submitting to a distress acknowledges the tenancy. The landlord, after distraining, cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord."

Here there have been three distresses; one upon Perry, and two upon Nightingale, all in the name of Blandy, the defendant. His title was never disputed by them, and there is no one to claim in opposition to it. The law and justice of the case coincide, and the rule must be discharged.

GASELEE, J. :

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The question is, whether or not the plaintiff was tenant to the defendant; and all the facts disclosed go to prove the affirmative. In 1827, it appears that Blandy was seised of the freehold of the premises in question, which before that time had been vested in the trustees under the marriage settlement of Mr. and Mrs. Mansel. He finds in occupation of the *premises, Perry, who is succeeded by Nightingale; they both pay the rent which is claimed as the defendant's, and after so paying it upon distress, without objection, they would not be permitted to dispute his title. It is contended, however, that they occupied under a lease granted by Mr. and Mrs. Mansel in 1809, with which, although the lessors had not the legal estate in them, the trustees never interfered. But the defendant is still entitled to the freehold under the conveyance of 1827; and the occupiers having admitted his title, while no other person has put in any claim, it is immaterial to the present decision, whether they occupied as tenants from year to year, or for a longer term. There is no reason for setting aside the verdict.

BOSANQUET, J. :

I am of the same opinion. The plaintiff is in the same situation as Nelson, who preceded Nightingale and Perry. The defendant distrained on them, and his rent was paid subsequently to the distress: this amounts to an acknowledgment of a tenancy at the rent for which the distress was made; whether for one or more years, it does not shew. As a general

rule, it is not competent to a tenant, after submitting to a distress, or payment of rent, to dispute his landlord's title. There are exceptions, indeed, to that rule, but this case is not one of them. It is not the case where a paramount claim has been established; the landlord's title has not expired; nor has there been any payment by mistake. It is nothing more than the case of a tenant picking a hole in the title of a person to whom his predecessors have paid rent without objection. But it is said, that though a tenant cannot dispute his landlord's title, here the defendant has himself shewn that the plaintiff is not his tenant. It appears, however, that the lease unnecessarily disclosed, was one which the lessors had no legal title to grant; and rent having *been paid to the defendant under a distress, it was not incompatible with that lease, that there might be a subsequent deed between the occupiers and the defendant. But at all events the payment of rent under the distress establishes his title as landlord, and the liability of the parties distrained on, as tenants, holding the premises at the rent for which the distrainer avows. In such a case, according to *Panton v. Jones*, the estoppel is reciprocal. BAYLEY, J. says, "I have no doubt that submitting to a distress acknowledges the tenancy: the landlord, after distraining, cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord."

Rule discharged.

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v.
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IRVING v. CLEGG AND ANOTHER (1).

(1 Bing. N. C. 53—58; S. C. 4 Moore & Scott, 572; 3 L. J. (N. S.) C. P. 265.)

Agreement to proceed to the East Indies, and there load a full and complete cargo; the fore-cabin to be filled with light goods; freight 4l. 15s. per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton; 100 tons of rice or sugar to be shipped previous to any other part of the loading, to ballast the vessel: Held, that the owner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of rice or sugar, was at liberty to complete the cargo with light goods.

1834.
May 31.

[53]

ASSUMPSIT on a charter-party, by which it was agreed that the ship *Eliza*, then lying at Bristol, and of the burthen of 323 tons

(1) Cited and followed in *Southampton Steam Colliery Co. v. Clarke* (Ex. Ch. 1870) L. R. 6 Ex. 53, 40 L. J. Ex. 8.—R. C.

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[*54]

or thereabouts, should take in and receive all such lawful goods as might be sent alongside, but not exceeding 300 tons of dead weight; and, being so loaded, should proceed therewith to Batavia, and there, or at Sourabaya, discharge the same; and being unloaded, should, at a port or ports in Sumatra or Java, both or either, load a full and complete cargo of merchandise, the fore-cabin or *dining-room included to be filled with light goods, which the defendants bound themselves to ship, not exceeding what the vessel could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded, should therewith proceed to Deal for orders, whether to discharge at London, Rotterdam, or Antwerp, or so near thereunto as she might safely get, and deliver the same on being paid freight for the outward cargo 300*l.*, and for the homeward cargo at and after the rate of 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton, nett weight at the King's beam, the tare of the sugar not to exceed 6 per cent.; and for all other goods, except those already mentioned, in just and fair proportion according to the East India Company's scale of tonnage; restraints of princes and rulers during the voyage always excepted. It was further agreed, that 100 tons of rice or sugar should be shipped previous to any other part of the loading, to ballast the vessel, and keep her in proper trim for the voyage; and that the defendants should have permission to send a supercargo.

Breach, that defendants did not, nor would, load or ship on board the said vessel a full and complete cargo of merchandise, according to the tenor and effect of the said charter-party and their said promise and undertaking, either at the said port called Sourabaya, or at any other port or ports in Sumatra or Java; but wholly refused and neglected so to do; and, on the contrary thereof, the defendants loaded and shipped on board the said vessel a small and insufficient cargo, being less than a full and complete cargo by divers, to wit, 100 tons, and wholly neglected and refused to make up the deficiency in the said cargo, or to ship any more merchandise on board the said vessel, either at the said port called Sourabaya, or at any other port or ports in Sumatra or Java: by means whereof the plaintiff lost

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[*55]

*and was deprived of a large sum of money, to wit, the sum of 500*l.*, for freight, which might, and otherwise would, have accrued to the plaintiff, if the defendants had loaded on board the said ship such a cargo as they ought to have loaded according to the terms of the said charter-party.

Upon this charter-party it was contended at the trial, that the defendants should have shipped a full cargo, so assorted and so complete as to render it unnecessary for the plaintiff to ship any ballast. It was proved, however, that, though the ship was fully loaded, the defendants had stowed such a proportion of pepper as to render it necessary for the master to ship thirty-six tons of stone ballast for the safety of the vessel, in addition to the 100 tons of rice.

A verdict having been obtained by the plaintiff for 130*l.* 4*s.* 8*d.* on a count for demurrage,

Wilde, Serjt., pursuant to leave given at the trial, moved to increase the damages by the sum of 380*l.* freight for the thirty-six tons thus devoted to ballast, as he contended, by the default of the defendants. He referred to *Wallace v. Small* (1), where, under a covenant to ship a full and complete cargo in the usual and customary manner, the defendant loaded a full cargo, but with such a proportion of heavy goods that the ship was improperly burthened beyond her tonnage; and Lord TENTERDEN, Ch. J. having left it to the jury to say whether such a mode of loading was permissible, the jury gave damages for the excess.

A rule *nisi* having been granted,

Spankie and *Coleridge*, Serjts. shewed cause :

Under the terms of this charter-party, the defendants had a right to load goods of whatever description they pleased, *provided they shipped 100 tons of rice or sugar previous to any other part of the lading. If it were not intended that the defendants should have this option, it had been unnecessary to enumerate the rate of freight for the coffee, rice, pepper, and other goods: it had been sufficient to require that the plaintiff

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(1) *Moo. & Mal.* 446 (not reported as to this point).

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should have so much freight for the entire ship. In *Wallace v. Small*, the ship was to be loaded in the manner usual and customary at the port of Calcutta. So in *Benson v. Schnieder* (1), the ship was to have a full cargo of cotton pressed according to the practice. Here, no usage of loading has been referred to, either in the charter-party or on evidence. *Hunter v. Fry* (2) only decided that where a ship is to have a full cargo, the question of fulness is not to be determined by a loose recital in the charter-party, which describes her to be of a certain number of tons, or thereabouts. But in *Moorsom v. Page* (3), where, by a charter-party, the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid, it was held, that, having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although, for the want of it, the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done.

To the same effect is Abbott on Shipping, 287, Roccus de Navibus et Naulo (notes), p. 72 to 75.

Wilde and Talfourd, Serjts. in support of the rule :

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It may be collected from this charter-party, that the intention of the parties was that the ship should be made available to the extent of her burthen, to earn freight. And this especially appears from the stipulation that the *defendants should first put in 100 tons of rice or sugar to supersede the necessity of ballast, and that the fore-cabin should be filled with light goods. The stipulation as to the early shipping of rice or sugar would have been unnecessary, if the owner was to renounce any portion of freight for the stowage of ballast. In *Moorsom v. Page* there was no such stipulation that the freighter should supply the place of ballast by goods of a certain description.

Cur. adv. vult.

(1) 7 Taunt. 272.

(3) 15 R. R. 731 (4 Camp. 103).

(2) 21 R. R. 340 (2 B. & Ald. 421).

TINDAL, Ch. J. :

IRVING
v.
CLEGG.

The question whether the *Eliza* has been loaded with a full and complete cargo upon her homeward voyage, appears to us to depend upon the construction which is to be put upon the terms of the charter-party itself; for as to any customary mode of loading upon the voyage described in the charter-party, none such is either referred to by the charter, nor is any such found by the jury.

Now, looking to the terms of the charter-party alone, it appears to us, that if it had not been for the insertion of the stipulation at the end, this case would have been governed by the decision in *Moorsom v. Page* (1); and that it would have been clear that, under the agreement by the freighter to furnish a full and complete cargo of merchandise, with the subsequent enumeration of the rate of freight for sugar, coffee, rice, pepper, "and all other goods," the freighter would be at liberty to load the ship with whatever goods and in whatever proportion he thought proper; and that the loss of freight, if any loss arose from the necessity of putting ballast into the ship, would be a loss that must fall on the owner.

But the question arises upon the stipulation at the end of the charter-party, by which the merchant undertakes to ship 100 tons of rice or sugar previous to any *other part of the lading; "to ballast the vessel, and keep her in proper trim for the voyage." And the question is, whether, under this stipulation, the freighter is bound to make up a full cargo of other articles in such proportions that freight shall be payable for the whole tonnage of the ship; or whether he may load a full cargo of the lightest commodities, and if any ballast is then wanting, it must be put in by the master, and occasion, *pro tanto*, a loss of freight. And we think the latter is the true construction of the agreement. In the first place, it is consistent with the very terms employed by the parties; and it is some violence to those terms, to hold them to extend to 136 tons, or to any other quantity that might be found necessary to ballast the ship. If the parties had intended so uncertain a quantity, we think they might have

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(1) 15 B. R. 731 (4 Camp. 103).

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expressed themselves to that effect. In the next place, it is the duty of the owner to find proper ballast for the ship, in order to make her trim for her voyage; the agreement in question, therefore, is an agreement made for the benefit of the owner, as it relieves him from so much of the obligation as is usually thrown upon him, and ensures him a freight for what would otherwise be unproductive. But it leaves the owner still liable to that obligation, except so far as the special agreement will extend, which here, by the very terms of it, is to 100 tons only.

We therefore think, that for any ballast that was necessary beyond this, the owner is bound to supply it; and that the freighter has not stipulated in any way that he will pay freight for the tonnage of such additional ballast; or, in other words, that he was at liberty to select a full and complete cargo out of such articles as he pleased, after first putting the 100 tons of rice for ballast.

Rule for increasing the damages discharged.

1834.

June 4.

[89]

TREMEERE v. MORISON (1).

(1 Bing. N. C. 89—99; S. C. 4 Moore & Scott, 603; 3 L. J. (N. S.) C. P. 260.)

Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rent and taxes, and for non-repair, to say, that the premises yield no profit.

[*90]

COVENANT. The plaintiff declared (venue Middlesex) that, by an indenture of June, 1812, he demised to one Edward Howes a certain messuage, with the appurtenances, for thirty-one years (wanting fifteen days) from the 25th of December, 1809, Howes covenanting *to pay plaintiff a rent of 97*l.* a year, and all levies, taxes, charges, assessments, and payments whatsoever charged on the premises, and to keep the premises in repair: that Howes entered; and that afterwards, in June, 1833, all Howes's estate, right, title, interest, and term of years then to come and unexpired in the premises legally came to and vested in the defendant, who thereupon entered into the premises, and became possessed thereof, to wit, in the county of Middlesex: that after the making of the indenture and during the term thereby granted,

(1) *Acc. Sleep v. Newman* (1862) authority of the principal case 12 C. B. N. S. 116, following the without comment.—F. P.

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and after the defendant became such assignee as aforesaid, and whilst he continued such assignee, to wit, on, &c. at, &c., a large sum of money, to wit, the sum of 27*l.* 15*s.*, of the rent aforesaid for three quarters of a year of the said term then elapsed, became and was due, and still was in arrear and unpaid to the plaintiff, contrary to the tenor and effect, true intent and meaning, of the said indenture and of the covenant in that behalf so made as aforesaid, to wit, at, &c.: that the defendant did not, nor would, after the said assignment and during the said term, and whilst the defendant was so possessed of the said demised premises with the appurtenances as aforesaid, bear, pay, and discharge the levies, taxes, charges, assessments, and payments wherewith the said premises were charged and chargeable after the defendant became such assignee as aforesaid, and whilst he was and continued such assignee, but wholly omitted and neglected so to do, to wit, at, &c.: that there was now a large sum of money, to wit, the sum of 10*l.*, for and in respect of such levies, taxes, charges, assessments, and payments as aforesaid, for three quarters of a year of the said term, during which period the defendant was so possessed of the said demised premises with the appurtenances, in arrear, unpaid and undischarged by the defendant, contrary to the tenor and effect, true intent and meaning, of the said indenture, and of the said covenant in that behalf so made as aforesaid: and that the defendant did not, nor would, after the said assignment and during the continuance of the said demise and whilst he was so possessed of the demised premises with the appurtenances as aforesaid, at his own proper costs and charges, as often as need required, well and sufficiently repair the said demised premises.

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The defendant, after two pleas on which no question arose, pleaded, thirdly, that he ought not to be charged with any damages by reason of the said breaches of covenant, or any or either of them, or any part thereof, otherwise than as administrator of P. Walker as thereafter mentioned, because, after the making of the indenture in the declaration mentioned, and during the term thereby granted, to wit, on, &c. at, &c., the said P. Walker duly made and published his last will and testament in writing, and thereby, amongst other things, then and there

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appointed one James Morrison sole executor thereof, and afterwards, to wit, on, &c. at, &c. the said P. Walker died so possessed of the said demised premises, without revoking or altering his said will; after whose death, to wit, on, &c. at, &c. the said J. Morrison, in due form of law, renounced the probate and execution of all and singular the goods, chattels, and credits, which were of the said P. Walker at the time of his death; and administration thereof, with the will of the said P. Walker annexed, in due form of law, was afterwards, to wit, on, &c. at, &c., granted to the defendant, who afterwards and after the decease of the said P. Walker, to wit, on, &c. at, &c., as such administrator, entered into and upon the said demised premises, and became and was possessed thereof for the residue of the said term of years by the said indenture granted and then and yet to come and unexpired of and in the said demised premises. And the defendant further said, that he had not, at any time *since the death of the said P. Walker, received and derived, or been able to receive or derive, any profit, interest, or advantage as such administrator or otherwise, by or from the said demised premises with the appurtenances, or any part thereof; and that the said demised premises had not, nor had any part thereof since the death of the said P. Walker yielded any profit whatsoever; and that the said term was not now, nor at any time since the death of the said P. Walker had the said demised premises or any part thereof, been, of any value whatsoever. And the defendant further said, that the estate, right, title, interest and term of years, property, profit, claim, and demand whatsoever of the said P. Walker, of and in the said demised premises, with the appurtenances or any part thereof, had not at any time come to or vested in the defendant by assignment, otherwise than under and by virtue of such administration as aforesaid, and that the said entry of the defendant was made by him as such administrator as aforesaid: and that the defendant was ready to verify, &c.

The fourth plea was to the same effect, with the addition of an averment of *plenè administravit* and an offer to surrender before the breaches occurred.

The plaintiff in his replication as to the third plea of the defendant, so far as the same related to the breach of covenant

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in the declaration first assigned, said, that the plaintiff, by reason of any thing by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the defendant, in respect of the said breach of covenant first above assigned, because the said demised premises from the time of the death of the said P. Walker hitherto had been and still were of great yearly value, to wit, of the value of the said yearly rent in the declaration mentioned, to wit, at, &c., and that, the plaintiff prayed might be enquired of by the country, &c.; and the plaintiff, as to *the third plea of the defendant, so far as the same related to the said breach of covenant in the declaration secondly above assigned, said, that the plaintiff by reason of any thing in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the defendant, in respect of the said breach of covenant secondly above assigned, because the said demised premises from the time of the death of the said P. Walker hitherto had been and still were of great yearly value, to wit, of a yearly value sufficient for the payment and discharge of the said levies, taxes, charges, assessments, and payments wherewith the said premises were charged and chargeable as in the declaration mentioned, to wit, at, &c., and that, the plaintiff prayed might be enquired of by the country, &c.; and the plaintiff, as to the third plea of the defendant, so far as the same related to the said breach of covenant in the declaration lastly above assigned, said, that the plaintiff by reason of any thing by the defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the defendant, in respect of the said breach of covenant lastly above assigned, because the defendant, since the death of the said P. Walker, could and might have and had received and derived great profit, interest, and advantage by and from the said demised premises with the appurtenances, and that the same from the time of the death of the said P. Walker had been and still were of great yearly value, to wit, of the yearly value of 100*l.*, to wit, at, &c., and that, the plaintiff prayed might be enquired of by the country, &c. The replication to the fourth plea was to the same effect, and in addition, took issue on the averment of *plenè administravit*.

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The defendant demurred to these replications.
Joinder.

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Atcherley, Serjt. in support of the demurrer :

The replication is ill, for it puts in issue an immaterial fact, viz., whether the premises were of any value. They might be of some value for the purpose of sale, and yet they might yield no profit to the administrator ; and unless they yield a profit, the administrator is not liable for rent or taxes ; at all events, not beyond the profit yielded. The result of the cases is stated in 1 Wms. Saunders, 112, note c. (edit. 5). " If an executor be sued in his representative capacity for rent accruing in his own time, either in debt or covenant, where the lease is by deed, or in debt or assumpsit for use and occupation, where the lease is not by deed, he may plead *plenè administravit*, and under that plea may shew that the land yields no profit, and that he has no assets *aliunde* ; but if the land yields a profit equal to the rent, he will fail on a plea of *plenè administravit*, for he is bound to apply the profits of the land towards payment of the rent in the first instance, and his not doing so will be a *devastavit* ; if, therefore, the land yields some profit, but less than the rent, it should seem that his plea should be *plenè administravit præter* the profit. If, on the other hand, the executor be sued, as he may be when he enters and is in the actual occupation, in his individual capacity as assignee of the term, in debt on a lease by deed, he must plead specially that he holds only as executor, that the land yields no profit, or less than the rent, and pray whether he shall be charged otherwise than *in detinet* : in covenant, he must plead the same matters specially : " *Hargrave's* case (1), *Bolton v. Canham* (2), *Helier v. Casebert* (3), *Buckley v. Pirk* (4), *Remnant v. Bremridge* (5), *Rubery v. Stevens* (6).

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If the defendant be sued as assignee and not as administrator, the venue ought to be local, as founded on privity of estate ; and then, the declaration is ill for not shewing the county in which the premises lie.

(1) 5 Co. Rep. 3.

(2) Pollexf. 125, Freem. 327.

(3) 1 Lev. 127.

(4) 1 Salk. 316.

(5) 19 R. R. 495 (8 Taunt. 191).

(6) 38 R. R. 242 (4 B. & Ad. 241).

(TINDAL, Ch. J.: That sufficiently appears in the averment that the defendant entered in Middlesex, the county in which the venue is laid.) TREMEER
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Then, the fourth plea not only tenders the same immaterial issue as the third, but is double, in offering also an issue on the *plenè administravit*.

Coleridge, Serjt. contra :

The third plea being pleaded to all the breaches is ill; for it is no answer to the third breach alleging non-repair: and a plea which is bad as to part, is bad for the whole: *Webb v. Martin* (1). That it is no answer to the third breach distinctly appears in *Tilney v. Norris* (2), *Buckley v. Pirk* (3), and *Sheppard's Touchstone*, 178. But, independently of this, the replication takes issue on a material fact. Whether the premises were of value is the proper question: whether the defendant could or not have made profit of them is either identical with it, or evidence of it. Where an executor, in possession, is sued as assignee on the covenants for rent and repairs, the whole liability is personal, and founded on privity of estate. The law presumes the possession to have value; but the liability is not in principle founded on the perception of the profits, nor measured by them. An ordinary assignee could no more relieve himself from keeping the covenants by alleging the want of profits, than the original lessee. But, as regards rent, the law has made a distinction between an executor sued as assignee and an ordinary assignee. It limits the liability on this head *to the profits actually received; taking so much of these profits as equals the rent, out of the general body of the assets, and specifically appropriating them to the landlord: *Hargrave's case* (4). No such distinction, however, prevails as to liability for repairs, the lessor having no such privilege in respect of the assets,—the executor assignee no such exemption; but the general rule prevails: *Spencer's case* (5), *Dean and Chapter of*

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(1) 1 Lev. 48.

(2) 1 Ld. Ray. 553, 1 Salk. 309.

(3) 1 Salk. 316.

(4) 5 Co. Rep. 31 b.

(5) 5 Co. Rep. 18, 6th resolution.

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Windsor's case (1), *Tilney v. Norris* (2). The object of the covenant for repair was the maintenance of the thing in being when the lease was made. Besides, administration is taken upon himself by the defendant *sponte sua*. The incurring the liability is his own act: the offer to surrender the premises (founded on the case of *Remnant v. Bremridge*) can have no effect on the defendant's liability for repairs: and that case turned in effect on the circumstance that the premises yielded no rent. It was an action for use and occupation.

Atcherley, in reply, persisted that the defendant as administrator was altogether discharged if the premises yielded no profit; and the replication, therefore, should have taken issue on that precise point.

As to the taking out letters of administration being the spontaneous act of the administrator, the same thing might be predicated of an executor who took out probate, since he was at liberty to renounce it.

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It is unnecessary for us to give any opinion as to the sufficiency of this replication, because we think that the third and fourth pleas are both bad in law. A plea which is bad in part, is bad altogether; *and these pleas, affecting to give an answer to the breach of covenant in not repairing, as well as not paying rent and taxes, cannot be supported; because the law, as it applies to personal representatives with respect to non-payment of rent or taxes, does not stand on the same footing as the law which binds them to repairs. The two cases are not within the same reason. Rent is received by an executor, not so much in the light of assets, as a profit of the land which is to be handed over to the landlord, in satisfaction or diminution of arrears that may be due. No such reason is applicable to the covenant for repairs. It would be a strange thing to say, for instance, that an executor or administrator shall not be bound to repair in the first year of a term, because they have derived no profit from

(1) 5 Co. Rep. 25; Dyer, 13 b, *Hyde v. Dean and Chapter of Windsor*, n. 67. Cro. Eliz. 552.

(2) 1 Roll. Abr. Covenant L. citing

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the premises: in effect, that would be saying that the lessor shall have no rent till the end of the term; for if the executor is not bound to repair in the first year because he has no profits, the same answer might be made in the second, and the premises might go on in a course of deterioration, till the end of the term, when, if the executor were without assets, the lessor might be deprived of any redress. But there is no case to shew, that when an executor is sued as assignee, he is not liable for repairs in the same manner as any other assignee. All the cases relied on for the defendant are actions for debt, and turn on the *debet*, or *debet* and *detinet*, which are only applicable to demands for non-payment of rent. On the other hand, the cases cited for the plaintiff tend to shew, that the rule with respect to rent does not extend to a covenant for repair. Let us look at the case of waste, which bears a strong analogy to the present. The law is clear, that "the executor or administrator of a tenant for years shall be punished for waste done in their own time; and that the judgment for the damages shall be against them *de bonis propriis*. And there is no difference *between permissive and voluntary waste, that will influence this case, because this breach of covenant is in nature of permissive waste; except that the case of waste is stronger; because treble damages are recoverable there, but single damages only in covenant. And if the executor assigns over, waste will lie against him in the *tenuit*; therefore, it is not hard to support this action; and judgment shall be against him *de bonis propriis*" (1). An executor, therefore, is liable for non-repair; and that, even where he permits dilapidation to continue, which did not commence in his own time. The same point was established in the *Dean and Chapter of Windsor's* case, where a man demised a house by indenture for years; the lessee, for him and his executors, covenanted and granted with the lessor to repair the house at all times necessary; the lessee assigned it over to Hyde, who suffered it to decay; the lessor brought an action of covenant against the assignee. And it was adjudged by POPHAM, Ch. J., and the whole Court, "that the action of covenant did lie, although the lessee had not covenanted for

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(1) 1 *Ld. Ray.* 554.

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[*99] On the ground, therefore, that the plea is now brought forward, for the first time, as an answer to an action of covenant for repairs; that no authority has been adduced in support of such a plea; and that the reason of the thing is altogether inconsistent with such a defence; we think that the plea is ill; that judgment must be given for the plaintiff; and that, as to this *point, it is unnecessary to consider whether there is any distinction between the situation of executor and that of administrator.

PARK, J. and GASELEE, J. expressed their concurrence.

BOSANQUET, J. :

The general rule is, that the executor of a lessee is liable as assignee, except that, with respect to rent, his liability does not exceed what the property yields. No such exception applies to the covenant for repairs.

Judgment for plaintiff.

1834.
June 5.

ALCHIN v. HOPKINS, CLERK.

(1 Bing. N. C. 99—102; S. C. 4 Moore & Scott, 615; 3 L. J. (N. S.) C. P. 272.)

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A composition with a clergyman, in consideration that his future income may be received by a trustee, and applied in liquidation of his debts, after providing for a curate, is void under 13 Eliz. c. 20.

IN answer to an action for a debt of 253*l.* due from the defendant to the plaintiff, the defendant put in an agreement for a composition entered into between the defendant and such of his creditors as signed the same, who thereby agreed not to sue, arrest, or molest the defendant, "in consideration that the future income of the defendant might be received by the Rev. Harry Lee, or some other person duly appointed by the

defendant, and applied in liquidation of the defendant's debts, after providing a competent stipend for a curate to serve the church."

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The defendant had no income other than the profits of a benefice with cure of souls, amounting to about 148*l.* a year.

Mr. Lee had received the amount, and after allowing 90*l.* a year for the performance of the duty, had distributed the residue, with the sanction of the defendant, among the defendant's creditors.

The defendant, however, had never signed the agreement.

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The plaintiff, upon the production of this agreement, was nonsuited, with leave to move to enter a verdict for the amount of his debt. Accordingly,

Coleridge, Serjt. in Easter Term obtained a rule *nisi* to that effect, on the ground that the agreement was not binding on the defendant, for want of his signature; for want of consideration; and as an infraction of the statute 13 Eliz. c. 20, which prohibits "all chargings of any benefice with cure, with any pension or any profit out of the same to be yielded or taken."

Mereuether, Serjt. shewed cause:

The defendant, having acted on the agreement by sanctioning the application of the profits, is bound by it, notwithstanding his omission to sign: *Good v. Cheesman* (1). And the forbearance of each creditor to sue is a sufficient consideration to bind the others. Nor is the agreement within the prohibition of 13 Eliz., for a curate is first to be provided for, and it does not appear on the face of the instrument that the profits of the benefice are actually conveyed away or charged; and a sequestration arising only incidentally, as a consequence of the clergyman's general liability, is not a charge within 13 Eliz. c. 20: *Flight v. Salter* (2), *Newland v. Watkin* (3).

Coleridge:

Taking the agreement and the conduct of the parties together,

(1) 36 R. R. 574 (2 B. & Ad. 328).

(3) 35 R. R. 524 (9 Bing. 113).

(2) 35 R. R. 413 (1 B. & Ad. 673).

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an intention to charge the benefice plainly appears; and therefore the case falls within the principle laid down in *Gibbons v. Hooper* (1), *Kirlew v. Butts* (2), and *Flight v. Salter*, where all the *decisions are collected. The agreement is, at all events, indirectly a charge; and the defendant cannot do indirectly what he is prohibited from doing directly: *Doe d. Mitchinson v. Carter* (3).

Cur. adv. vult.

TINDAL, Ch. J.:

The question brought before the Court in this case is, whether the agreement for a composition entered into between the defendant and such of his creditors as signed the same, operates as an answer to the present action. By the terms of the agreement, the several creditors who signed the same agreed not to sue, arrest, or molest the defendant "in consideration that the future income of the said defendant might be received by the Rev. Harry Lee, clerk, or some other person duly appointed by the said defendant, and applied in the liquidation of the said debts." It was found at the trial of the cause, that the defendant had no other income than the profits of a benefice with cure of souls. The agreement may, therefore, be considered to refer to the income of the defendant arising from his living, and no other.

The objection made on the part of the plaintiff is, that the agreement is void by the statute 13 Eliz. c. 20, by which "all chargings of any benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, shall be utterly void." The effect of the instrument, supposing it to have any effect whatever, is to appropriate the future profits of the living to the payment of the debts of the defendant; for we cannot think the clause by which it is provided that a competent stipend for a curate to serve the church shall be first paid, will take the agreement out of the statute. There are many purposes to which the profits of a benefice ought to be *employed, on principles of public policy, besides the finding of a curate, such as the repairs of the chancel

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(1) 36 R. R. 726 (2 B. & Ad. 734). 736, n.).

(2) 36 R. R. 727, n. (2 B. & Ad. (3) 4 R. R. 586 (8 T. R. 300).

and parsonage, the money payments to which the church is liable, and the like. The effect of the instrument, therefore, although not operating as a direct charge, is an agreement to charge the profits of the living; and if such an agreement were not held to fall within the prohibition of the statute, all its purposes might be avoided with the greatest facility.

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But, independently of the objection under the statute of Elizabeth, it appears that this agreement was never signed by the defendant. In case, therefore, the creditors should sue upon it, they would be met by the preliminary objection, that a contract for the profits of a living to be paid over to a trustee or receiver, was a contract "for an interest in or concerning lands, tenements, or hereditaments," and that no action would lie upon it, as it "had not been signed by the defendant, or by any person thereunto by him lawfully authorized." We think, upon this ground also, the agreement for composition is not of such a description as can be held a bar to the present action (1). For the principle on which such an agreement is held to operate as an answer to an action by a creditor who has come into it, is, that there has been a substitution of a new agreement, by mutual consent, and on good consideration, in the stead or place of the old contract. This is the point established by the case of *Good v. Cheesman*, to which we entirely accede. The new or substituted agreement must, therefore, of necessity be one which is legal and valid; or the whole ground on which the release of the former contract depends, is destroyed. Inasmuch, however, as the agreement in question is liable to the objections above adverted to, we think it fails as a composition that can be enforced at law.

Rule absolute for entering verdict for plaintiff for 253l.

(1) The judgment on this point is *McManus v. Cooke* (1887) 33 Ch. D. 681, 687, 56 L. J. Ch. 662, 664.—R. C. cited and followed by KAY, J. in

1834.
 June 9.
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TRIMBEY v. VIGNIER (1).

(1 Bing. N. C. 151—160; S. C. 4 Moore & Scott, 695; 3 L. J. (N. S.) C. P. 246; S. C., at Nisi Prius, 6 Car. & P. 25.)

By the law of France (as given in evidence), an indorsement in blank does not transfer any property in a bill of exchange: Held, that the holder of a bill drawn in France, and indorsed there in blank, cannot recover against the acceptor in the Courts of this country.

THIS action was brought in February, 1833, by the plaintiff, an Englishman resident in London, as holder, against the defendant as the maker of the two promissory notes (one for 610 francs, the other for 300) in the following form:

“A la fin Décembre prochain je payerai à l'ordre de M. Burillon la somme de six cents dix francs valeur en marchandize.

“PARIS, le 10 Juillet, 1829.

“B. P., 610 francs.

“E. VIGNIER,

“Rue St. Denis, 193.”

Indorsed,

“Payez à M. Durant valeur en compte. Paris, le 30 Juillet, 1829.

“P. BURILLON.

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“Je garantis à M. Durant le protêt et la dénonciation du present billet, comme s'il avait été fait, le dispensant de ces formalités. Paris, le deux Janvier, 1830.

“P. BURILLON,

“P. DURANT.”

At the trial before Bosanquet, J., the plaintiff produced the notes, which were on unstamped paper, and proved the handwriting of the respective parties, and the value of the notes in English currency.

The defendant then called a witness, who stated himself to be an avocat, and that he had practised as such upwards of twenty years, and was then attached in that capacity to the French consulate in London; that he was conversant with the laws of

(1) Cited and followed, on the question of conflict of laws, by KAY, L. J. in *Alcock v. Smith*, '92, 1 Ch. 238, 269, 61 L. J. Ch. 161, 171, C. A. But it would seem by the decision of the Exchequer Chamber in *Bradlaugh v.*

De Rin (1870) L. R. 5 C. P. 473, 39 L. J. C. P. 254, that the evidence of the French law in the principal case was not correctly understood by the Court. See Chalmers on Bills of Exchange, 5th ed. 240, n. 6.—R. C.

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France ; that, by the law of France, a protest must always be made, and that no action could be maintained upon promissory notes and bills of exchange unless they were protested ; that the indorsement to the plaintiff being in blank, and not according to the formalities required by the Code de Commerce, articles 136, 137, 138, was invalid, and passed no interest to the holder. In support of that statement the articles in the Code de Commerce above referred to were read and translated to the jury : By 136, “ La propriété d’une lettre de change se transmet par la voie de l’endossement ; ” 137, “ L’endossement est daté. Il exprime la valeur fournie. Il énonce le nom de celui à l’ordre de qui il est passé ; ” 138, “ Si l’endossement n’est pas conforme aux dispositions de l’article précédent, il n’opère pas le transport, il n’est qu’une procuration.”

It was also proved that, at the time the action was brought, the defendant was domiciled and carried on business in London ; but, at the time when the notes respectively were drawn and fell due, the maker and *indorser thereof were all resident in France, and French subjects.

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The jury found, in reply to the enquiries of the learned Judge, that the defendant was living in France at the time when the notes were drawn, and when they fell due ; that Durant, the indorser, was also a resident in Paris at the same time ; that according to the laws of France the indorsement was invalid, and that a protest was necessary. On that finding the learned Judge directed a verdict to be entered for the defendant, reserving all questions of law : and such verdict was entered accordingly, with leave to move to enter a verdict for the plaintiff on the points reserved.

Subsequently to the verdict, by leave of the Court, and with consent of the parties, it was given in evidence that the plaintiff was in England when he received the bills.

In the following Term *Taddy*, Serjt. moved to set aside the verdict on the following grounds :

First, That, admitting the law of France to be as stated, it could not govern the right of parties resident in England, the requisites of the Code relied upon by the defendant being merely municipal regulations.

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Secondly, That the law of France was misrepresented by the defendant's witnesses.

The Court, thereupon, granted a rule calling on the defendant to shew cause why the verdict should not be entered for plaintiff; or, why there should not be a new trial; and directed that before cause was shewn, the opinion of French advocates should be obtained, as to the law of France upon the points at issue.

Upon the rule coming on for argument, the Court directed the circumstances to be set forth in a special case; and that it should contain any opinions of French advocates which had been taken on either side up to that period.

[154] The opinion obtained by the plaintiff as to the indorsement in blank,—the only point on which the Court pronounced judgment,—was as follows :

“ This circumstance was no obstacle to Mr. Trimbeý's right of action, for the 138th article of the Code de Commerce thus expressed, ‘ If the indorsement is not conformable to the requisition of the preceding article, it does not operate as a transfer of interest, but only as a procuration,’ is only available on behalf of the party making the indorsement in blank against the immediate holder under such indorsement. If, however, the holder under an indorsement in blank does not proceed against the party immediately endorsing to him, but against the maker of the note, or against the parties who have made regular indorsements, neither the maker nor such parties can avail themselves of the provision of the 138th article of the Code. Upon this point the jury has been completely led into error.

“ PARIS, the 21st of May, 1833.

“ BLANCHET.”

An opinion had been obtained by the defendant prior to the period when the rule *nisi* came on for argument, which, as to the indorsement in blank, was as follows :

“ There is no doubt that, according to the French law, an indorsement in blank is insufficient to transmit regularly the property in a bill of exchange or promissory note. The Code de Commerce is precise on this point. Art. 137 says, ‘ The indorsement is dated; it expresses the value given for it, and states the name of him to whose order it is passed.’ The art. 138 adds,

'If the indorsement is not conformable to the preceding article, it does not operate as a transfer,—it is only a procuration.'

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"PARIS, the 21st of October, 1833.

"VERVOORT."

The various authorities in the French law as to indorsement, which were relied upon in favour of the defendant, are to be found in the Code de Commerce, arts. 136 to 139, and art. 110.

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The questions for the opinion of the Court were,

First, If the correct construction of the terms of the Code de Commerce which apply to the circumstances in this action were such as to prevent the plaintiff from enforcing payment against the defendant in the Courts of France, would the law of France govern the rights of the parties under the circumstances of this case?

Secondly, If the decision of this case were to depend upon the terms of the Code de Commerce, then the Court was to say how far the articles of the Code relied upon by the defendant applied to the circumstances of this case; and whether a correct construction had been put upon such articles by the evidence and opinions produced by the respective parties.

If the Court should be of opinion that, under the circumstances, the plaintiff ought to have recovered, then a verdict was to be entered for him; if not, the verdict for the defendant was to stand.

The case was argued in Easter Term.

Taddy, Serjt. for the plaintiff:

Admitting, for the sake of argument, that Trimbeay could not have sued the defendant in the French Courts, because Durant's indorsement is not conformable to the 137th article of the Code de Commerce, he may, nevertheless, sue in the English Courts, where an indorsement in blank operates as a complete transfer. The interpretation of a contract is governed by the law of the country in which the contract is made; but the judicial procedure applicable to it depends on the law of the country in which the action is brought. Huberus de Conflictu *Legum, tit. 3, s. 7: "Receptum est optimâ ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato,

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spectetur, ut docet Sandius, lib. 1, tit. 12, def. 5, ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci in quo fit executio, non ubi res judicata est : " *De la Vega v. Vianna* (1), *British Linen Company v. Drummond* (2), *Williams v. Jones* (3), *Wynne v. Jackson* (4), *Shaw v. Harvey* (5), *Doe v. Vardill* (6). And the objection taken on the part of the defendant does not apply *ad valorem contractus*, but *ad modum actionis instituendæ*.

Stephen, Serjt. for the defendant :

The objection applies *ad valorem contractus*, and not *ad modum actionis instituendæ*; for if the indorsement be not in conformity with the French Code, no interest passes to the holder, and consequently there is no contract between him and the maker. To ascertain whether there be any contract or not between the parties, we must resort to the law of the country where the contract was made : *Lacon v. Higgins* (7), *Dalrymple v. Dalrymple* (8). So, for the construction of the contract : *Talleyrand v. Boulanger* (9); and the right of action upon it : *Burrows v. Jemino* (10), *Ballantine v. Golding* (cited in *Smith v. Buchanan* (11), *Solomons v. Ross* (cited in *Folliott v. Ogden* (12), *Potter v. Brown* (13), *Clegg v. Levy* (14). For the maker cannot be supposed to have contemplated that he would be subject to rights of action according to the law of England, and if the foreign law furnish the *rule on one point, it must also furnish it on the others : *Tenon v. Mars* (15), *Innes v. Dunlop* (16). In *Shaw v. Harvey*, Lord TENTERDEN decided in effect that the contract was not a foreign contract. The *British Linen Company v. Drummond* is a decision on the Statute of Limitations which affects only *tempus et modum actionis*; and *De la Vega v. Vianna* turned on the same distinction. The question, therefore, turns on the construction of the 137th and 138th articles of the Code de Commerce. Now the 138th article is express and without qualification, that an indorsement in blank

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(1) 35 R. R. 298 (1 B. & Ad. 284).

(2) 34 R. R. 395 (10 B. & C. 903).

(3) 12 R. R. 401 (13 East, 439).

(4) 2 Russ. 351.

(5) 31 R. R. 755 (Moo. & Mal. 526).

(6) 5 B. & C. 438.

(7) 1 Dowl. & Ry. N. P. C. 38.

(8) 2 Haggard's Rep. 58.

(9) 4 R. R. 58 (3 Ves. 447).

(10) 2 Str. 733.

(11) 5 R. R. 500 (1 East, 10).

(12) 1 H. Bl. 131.

(13) 7 R. R. 663 (5 East, 124).

(14) 3 Camp. 166.

(15) 8 B. & C. 638.

(16) 8 T. R. 595.

does not operate as a transfer of the note; and Pothier, in his commentary on the article (4th vol. edit. Dupin, 1827), says, that the object of the law is to prevent fraud against the creditors of the indorser, and cites Heineccius to shew that an indorsement in blank passes no property. It is a mere procuration, and a procurator cannot sue.

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Taddy, in reply :

Pailliet, Manuel de Droit Français, p. 1225, ss. 6, 8, in a note to article 138, gives a different view of the law of France as to a blank indorsement. “L'accepteur ne peut se refuser au paiement d'une lettre de change, sous le prétexte que l'ordre est en blanc. Les endosseurs et leurs créanciers sont les seuls qui puissent faire valoir ce moyen.” “L'endossement en blanc peut valoir autrement que comme procuration. Il peut valoir comme titre propre et personnel au porteur, s'il est constant que l'effet endossé en blanc fut remis au porteur avec l'intention de la saisir du titre; par exemple, pour lui servir de garantie des valeurs qu'il aurait fournies au souscripteur de l'effet.”

If it can confer a title on the holder, why not a title to sue also? for if the indorser can transfer the property, the indorsee must have the right to obtain it. But indorsement *is a mere formality, and not of the essence of the contract, and therefore the mode of proceeding upon it must be determined by the law of the country in which the action is brought: Huber, pp. 538, 540. *Dalrymple v. Dalrymple* was a case concerning marriage, which is a *status* and not a mere contract; and *Potter v. Brown* and most of the other cases cited for the defendant, turned on the law of bankruptcy, in which the Courts here have always given effect to the regulations of other countries.

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Cur. adv. vult.

TINDAL, Ch. J. :

The point which has been reserved for consideration in this case is, whether the plaintiff, under the circumstances stated in the special case, is entitled to maintain this action in an English court of law, in his own name? for, as to the several other objections which have been raised, the view which we have taken

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of the question above adverted to renders it unnecessary for us to give any opinion.

The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first enquiry therefore is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France.

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Upon this point of French law, the opinions of the foreign advocates which have been taken, by consent, since the trial of the cause, appear to be contradictory; but as each of them founds his opinion on the Code de Commerce, arts. 137, 138, we feel ourselves at liberty to refer to the text of that Code, in order to form our own judgment on the point; and upon reference thereto, we think the language of the Code is clear and express, that an indorsement in blank, that is, without containing the *date, the consideration paid, or the name of the party to whose order it is passed, does not operate as a transfer of the note; it is but a procuration. And the language of the Code being general, and unrestricted by any expressions which confine its operation to questions between the indorsee and the indorser of the note, we think, that if an action had been brought in any of the courts of law in France against the maker of the note, it would have been held not to be maintainable in the name of the plaintiff, but that he should have sued in the name of the last indorser by procuration.

The question, therefore, becomes this. Supposing such rule to prevail in the French Courts by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England applicable to the case of a note indorsed in blank in England, allowing the action to be brought in the name of the holder?

The rule which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this; that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractus*), the mode of suing, and the time within

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which the action must be brought, must be governed by the law of the country where the action is brought (*in ordinandis judiciis, loci consuetudo, ubi agitur*). See Huberi Prælectiones Civilis Juris, tit. 3, De Conflictu Legum, sect. 7. This distinction has been clearly laid down and adopted in the late case of *De la Vega v. Vianna* (1). See also the case of the *British Linen Company v. Drummond* (2), where the different authorities are brought together.

The question therefore is, whether the law of France, *by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case it must be adopted by our Courts, in the latter it may be altogether disregarded, and the suit commenced in the name of the present plaintiff.

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And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed, the difference in the consequences that would follow, if the plaintiff sues in his own name, or is compelled to use the name of the former indorser as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences we think the law of France falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing.

We therefore think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the Courts of the country where such contract was made; and that such being the case there, we must hold in our Courts that he can have no right of suing here.

Judgment for the defendant.

(1) 35 R. R. 298 (1 B. & Ad. 284).

(2) 34 R. R. 595 (10 B. & C. 903).

1834.
June 12.
 [182]

HAWORTH *v.* HARDCASTLE AND OTHERS.

(1 Bing. N. C. 182—193; S. C. 4 Moore & Scott, 720; 3 L. J. (N. S.)
 C. P. 311.)

In case for invading plaintiff's patent right to certain machinery for drying calicoes, &c., where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same machinery; a jury having found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up goods, the Court refused to set aside the verdict for the plaintiff and enter a nonsuit.

CASE for invading the plaintiff's patent right in "certain machinery or apparatus adapted to facilitate the operation of drying calicoes, muslins, linens, or other similar fabrics."

At the trial before Tindal, Ch. J., it appeared that the method in which that operation was performed previously to 1823, when the patent was granted, and in which it is now commonly performed by those who have not obtained leave to use the patent machinery, or *who are not infringing the right, is as follows, viz.: men are employed to pull down the wet calico into looped folds, which hang down from beneath the spaces between horizontal parallel cross rails (called staves), which staves are fixed in rows side by side across the interior of a building called a drying-house or stove, so as to form a horizontal plane or platform, like a floor, extending throughout such building. The building is usually made high enough to contain three such platforms, or floors, or rows of horizontal parallel cross rails, situated at such heights, one above another, that a man standing on one floor can readily reach up through the spaces between the staves above his head, in order to take hold of the two selvages of the wet calico which he has previously extended horizontally over and across the staves above his head; from these staves the wet calico is hung in looped folds, in order that it may be dried by the heat which is kept up within the building. The looped folds are formed by pulling down the calico from the staves over head by repeatedly taking hold of the two selvages and pulling them down nearly to the next floor of staves below, on which the man stands: during the act of thus pulling down the wet calico, it is all necessarily dragged across

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the staves upon which it has been placed: and by this mode a man can only hang up one piece of calico at a time, though the staves are usually made long enough for three or four pieces of calico to be hung side by side on the same stave: the length of the loops, too, which can be formed, is restricted to the height to which a full grown man can reach when standing on one floor to take hold of the calico extended on the staves above his head.

The patentee's specification described his method as follows: "My invention consists in the application of certain machinery or apparatus adapted to perform the operation of hanging or suspending damp or wet *calicoes, linens, or other similar fabrics (over a series of rails, or staves, situated in a stove or drying-house), for the purpose of drying the same: the said machinery being also adapted to perform the operation of taking down or removing the said calicoes, muslins, linens, or other similar fabrics (from off the said rails or staves), after they have been sufficiently dried: by means of which invention a considerable saving of labour and expense may be effected in the operation of drying. I construct the stove or drying-house in a manner nearly similar to that at present in use; and I arrange the rails or staves (over which the cloth or fabric is intended to be hung or suspended) near to the upper part of the stove or drying-house: I then construct a frame or carriage in such a manner as to be capable of moving freely upon guides or supports from one end of the drying-house to the other, the said carriage being situated immediately above the range of rails or staves, but so as not to bear upon them; this carriage is furnished with proper supports for receiving certain rollers or boxes, upon the circumference of which rollers or boxes the wet cloth or fabric has been previously wound. The carriage is also furnished with certain cylinders or drums, which are caused to revolve in such a manner as to draw or wind the wet cloth or fabric from off the aforesaid rollers or boxes in a regular manner: thus, if the frame or carriage, with its appendages, be slowly moved along upon its guides above the rails or staves at the same time that the wet cloth or fabric is in the act of being drawn off the circumference of the rollers or boxes by the operation of the revolving cylinders or drums before mentioned, the wet cloth or fabric will descend

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in the vacancies between the rails or staves, and will hang down in loops or folds, so as effectually to expose its surface to the action of the dry or heated air, and in order to suit the depth or height of the stove *or drying-house. The depth or length of the said loops or folds may be regulated or determined by the length of cloth or fabric which would be given out by the revolving cylinders or drums during the passage of the frame or carriage from one stave to the next. When the cloth or fabric has been hanging a sufficient length of time to become dry, it may be taken up again, or drawn off the rails or staves, and wound again upon the circumference of the rollers or boxes. This operation I perform by simply causing the frame or carriage, with its appendages of rollers and cylinders, to traverse slowly along the drying-house in the contrary direction to what it moved during the operation of hanging the cloth, at the same time that the cylinders or drums are caused to revolve in a suitable direction for taking or winding up the cloth or fabric upon the circumference of the rollers or boxes: by this means the dry cloth may be wound evenly upon the circumference of the rollers or boxes, and removed from the machine. In some situations I find it advisable to vary the mode of arrangement, by causing the rails or staves (over which the cloth or fabric is intended to be hung) to be connected together with chains or ropes, somewhat in the manner of a rope ladder, being connected by endless chains or ropes, with a train or wheels, or other well known machinery, so as to be moved slowly along upon guides from one end of the stove or drying-house to the other: in this last-mentioned arrangement the frame or carriage containing the revolving cylinders or drums for giving out and taking up the cloth remains stationary at one part of the stove or drying-house. The operation of this machinery would be similar to the one before described with the traversing carriage, for as the cylinders or drums are caused to revolve and give out the cloth or fabric at the same time that the chain of rails or staves were moving slowly beneath the cylinder or drum, *the cloth or fabric would descend between the staves, and hang down in loops or folds, in a manner similar to the machine with the moving carriage."

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This was followed by a detailed explanation of drawings and plans which accompanied the specification; and the specification concluded thus: "I have now described fully one mode of carrying my invention into effect, and I do hereby declare, that I consider my claim of invention to extend to application of the machinery or apparatus as hereinbefore described, for the purpose of facilitating the operation of drying calicoes, muslins, or other similar fabrics; which machinery or apparatus is adapted by means of a revolving and traversing cylinder or cylinders, situated over a series of stationary rails or staves arranged in a stove or drying-house, in such a manner that the pieces of calico, muslins, linen, or other similar fabrics may be previously wound upon the circumference, and by the revolving and traversing motion of the aforesaid cylinder or cylinders over the stationary rails or staves, or otherwise by the revolving motion of the cylinder or cylinders, and the traversing movement of the rails or staves themselves, may be caused to descend in the spaces between the said rails or staves, and hang down in long loops or folds, in order to spread the pieces quickly and expose their surfaces, so as to facilitate the operation of drying the same; the said machinery or apparatus being also adapted to perform the operation of taking up or removing the said calicoes, muslins, linens, or other similar fabrics from off the said rails or staves, and winding or rolling them upon the circumference of a roller or rollers, so that they may be removed from the machine after being sufficiently dried; at the same time I must observe, that the form and proportion of the different parts may be varied according to the situation or discretion of the workman employed in constructing *the same; the materials of which the same may be made may also be varied according to the circumstances of the case, without departing from the intent and object of my invention as above described and set forth."

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With respect to the novelty of the invention, the evidence was in some measure conflicting, and it appeared that the machine failed in taking up certain cloths stiffened with clay for deceptive purposes.

The learned Judge left it to the jury to say, whether the invention was new, and sufficiently described in the specification;

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whether the machine could take cloth up for any useful purpose; and whether the defendants had been guilty of any infringement on the patent.

The jury found that the invention was new, and useful upon the whole; that the specification was sufficient for a mechanic, properly instructed, to make a machine from; that there had been an infringement on the patent; but that the machine was not useful in some cases for taking up goods.

Upon this finding, a verdict was entered for the plaintiff, with leave for the defendants to move to set it aside and enter a nonsuit instead, on the ground that the jury had, by their special finding, negatived the usefulness of the invention to the full extent which the patent and specification held out; and that the patentee had claimed in his specification the invention of the rails or bars over which the cloths were hung, or, at all events, the placing them in tiers, notwithstanding the use of such rails was common before. Accordingly,

Stephen, Serjt., in Hilary Term, moved to enter a nonsuit on those grounds, or to have a new trial on the ground that the verdict was against evidence, and that the jury had been misdirected on the point of the capability of the machine to take up cloth. They should have been directed to consider, whether it would take *cloth up according to the description in the patent, not whether it would take up for any useful purpose. *Felton v. Greaves* (1), *Turner v. Winter* (2), *Bloxam v. Elsec* (3), *Brunton v. Hawkes* (4), *Rex v. Else* (5), *Bovill v. Moore* (6), *Campion v. Benyon* (7), and *Macfarlane v. Price* (8), were cited.

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A rule *nisi* was granted on the three first grounds, and refused as to the alleged misdirection.

Wilde and *Coleridge*, Serjts., who shewed cause, after examining the sufficiency of the evidence as to the novelty of

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| (1) 33 R. R. 706 (3 Car. & P. 611). | (6) 17 R. R. 514 (2 Marsh. 211). |
| (2) 1 R. R. 311 (1 T. R. 602). | (7) 23 R. R. 549 (3 Brod. & B. 5). |
| (3) 30 R. R. 275 (6 B. & C. 169). | (8) 18 R. R. 760 (1 Starkie, N. P. |
| (4) 23 R. R. 382 (4 B. & Ald. 541). | 199). |
| (5) 11 East, 109, n. | |

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the plaintiff's invention, and the infraction of his patent by the defendants, contended that the taking up cloths after the drying was not an essential part of the patent, which was for machinery adapted to facilitate the operation of drying only. But, even if it were an essential part of the patent, the finding of the jury was sufficient to sustain the verdict for the plaintiff; for it might be inferred from the qualified expression that the machine was not useful for taking up in some cases, that it was useful for taking up in general; and a failure in a few instances would not vitiate the patent: *Crossley v. Beverley* (1), *Jones v. Pearce* (2). Besides, the validity of a patent did not altogether depend upon its immediate usefulness; for the profitable application of a mechanical discovery was often subsequent to invention: *Lewis v. Marling* (3).

And, upon a reasonable construction of the specification, the plaintiff did not, as the defendants alleged, claim the rails as part of his invention; for, in the *language of the specification, "he constructs the drying-house in a manner nearly similar to those at present in use, and arranges the rails near the upper part of the said drying-house:" meaning, the rails at present in use.

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Stephen, in support of the rule, after enforcing his original objections, urged further that the patent was taken out for machinery, whereas the specification was for the application of machinery, or for a method only; but, upon this point, the Court gave no opinion.

Cur. adv. vult.

TINDAL, Ch. J.:

This case has been brought before us upon a motion for a rule either to enter a nonsuit upon leave given for that purpose by the Judge at the trial, or for a new trial, on the ground of misdirection of the learned Judge who tried the cause, and also that the verdict of the jury had been given against the weight of the evidence. Upon the discussion which took place upon the original motion, the Court were satisfied that the direction

(1) 3 Car. & P. 513.

ment, p. 10.

(2) Godson on Patents, supple-

(3) 34 R. R. 313 (10 B. & C. 22).

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of the learned Judge was right, and the rule was consequently granted upon the two remaining grounds only.

The motion for entering a nonsuit was grounded on two points: first, that the jury had, by their special finding, negatived the usefulness of the invention to the full extent of what the patent and specification had held out to the public; secondly, that the patentee had claimed, in his specification, the invention of the rails or staves over which the cloths were hung, or, at all events, the placing them in a tier at the upper part of the drying-room.

[*190] As to the finding of the jury, it was in these words: "The jury find the invention is new, and useful upon the whole, and that the specification is sufficient for a *mechanic, properly instructed, to make a machine, and that there has been an infringement of the patent; but they also find that the machine is not useful in some cases for taking up goods."

The specification must be admitted, as it appears to us, to describe the invention to be adapted to perform the operation of removing the calicoes and other cloths from off the rails or staves after they have been sufficiently dried. But we think we are not warranted in drawing so strict a conclusion from this finding of the jury as to hold that they have intended to negative, or that they have thereby negatived, that the machine was not useful, in the generality of the cases which occur for that purpose. After stating that the machine was useful on the whole, the expression that, in some cases, it is not useful to take up the cloths, appears to us to lead rather to the inference that, in the generality of cases, it is found useful. And if the jury think it useful in the general, because some cases occur in which it does not answer, we think it would be much too strong a conclusion to hold the patent void. How many cases occur, what proportion they bear to those in which the machine is useful, whether the instances in which it is found not to answer are to be referred to the species of cloth which are hung out, to the mode of dressing the cloths, to the thickness of them, or to any other cause distinct and different from the defective structure, or want of power in the machine, this finding of the jury gives us no information whatever. Upon such a finding,

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therefore, in a case where the jury have given their general verdict for the plaintiff, we think that we should act with great hazard and precipitation if we were to hold that the plaintiff ought to be nonsuited, upon the ground that his machine was altogether useless for one of the purposes described in his specification.

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As to the second ground upon which the motion for *a nonsuit proceeded, we think, upon the fair construction of the specification itself, the patentee does not claim as part of his invention, either the rails or staves over which the calicoes and other cloths are to be hung, or the placing them at the upper part of the building. The use of the rails and staves for this purpose was proved to have been so general before the granting of this patent, that it would be almost impossible, *a priori*, to suppose that the patentee intended to claim what he could not but know would have avoided his patent; and the expressed statement that he makes, "that he constructs the stove or drying-house in the manner nearly similar to those which are at present in use, and that he arranges the rails or staves on which the cloth or fabric is intended to be hung or suspended, near to the upper part of the said stove or drying-house," shews clearly that he is speaking of those rails or staves as of things then known and in common use, for he begins with describing the drying-house as nearly similar to those in common use; he gives no dimensions of the rails or staves; no exact position of them, nor any particular description by reference, as he invariably does when he comes to that part of the machinery which is peculiarly his own invention. There can be no rule of law which requires the Court to make any forced construction of the specification, so as to extend the claim of the patentee to a wider range than the facts would warrant; on the contrary, such construction ought to be made as will, consistently with the fair import of the language used, make the claim of invention co-extensive with the new discovery of the grantee of the patent. And we see no reason to believe that he intended under this specification to claim either the staves, or the position of the staves as to their height in the drying-house, as a part of his own new invention.

As to that part of the rule which relates to the granting

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*of a new trial on the ground of the former verdict being against evidence, this case comes before us under such peculiar circumstances, that unless we were thoroughly satisfied that the verdict was wrong, we hold that we ought not to interfere. The trial took place before a special jury, it occupied two days of close and laborious investigation; the questions whether the invention was new, and whether there was any infringement, were specifically and pointedly left to the jury; the jury found their verdict for the plaintiff, which verdict, we are authorised to say, was entirely to the satisfaction of the learned Judge who presided at the trial. These circumstances alone would be sufficient in ordinary cases to induce the Court to refuse to interfere. But in addition to these strong grounds for the course we take on this occasion, it should be observed, that this is the case of a patent granted in the year 1823, having therefore now only three years longer to remain in force; and further, the defendants, or some other persons have, since this action has been tried, procured a *scire facias* to be filed to avoid the patent. As this is a mode of trial in which the precise objections to the patent may be raised by the pleadings, and the questions made on the former trial may be carried by writ of error to a higher tribunal, we do not feel ourselves called upon, unless upon a much stronger case than the present, to take away from the plaintiff the benefit of the verdict which the jury have given him. If this further proceeding by *scire facias* had not been instituted and now pending, we might have felt ourselves called upon to discuss and consider one objection advanced by the learned counsel for the defendants; namely, that the patent is taken out for machinery, whereas the specification is made for the application of machinery, or for a method only. But as this objection as well as the others can receive a more solemn decision upon the occasion to which we have

[*193] *adverted, we shall offer no opinion on it now; which we think we are the less called upon to do, on this occasion, as it was not an objection taken upon the trial of the cause before the jury, but for the first time raised when the defendants were heard in support of their rule.

Rule discharged.

FINCH v. BROOK.

(1 Bing. N. C. 253—258; S. C. 1 Scott, 70; 4 L. J. (N. S.) C. P. 1.)

On a plea of tender of 1*l.* 12*s.* 5*d.* the jury found specially, that defendant's attorney called on plaintiff and said, "I come to pay you 1*l.* 12*s.* 5*d.* which defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money; that plaintiff said, "I can't take it, the matter is now in the hands of my attorney:" Held, upon writ of false judgment, that such finding did not warrant a judgment for defendant.

1834.
Nov. 12.

[253]

THIS was a writ of false judgment from the County Court of Cambridgeshire, where, to debt for goods sold, the defendant pleaded *nil debet*, except as to 1*l.* 12*s.* 5*d.*, parcel of the demand; and as to that sum, that, after the time when the said sum of 1*l.* 12*s.* 5*d.*, *parcel, &c. became due and payable, and before the exhibiting of the bill of the plaintiff in that behalf, to wit, on, &c. at &c. and within the jurisdiction aforesaid, the defendant was ready and willing, and then and there tendered and offered to the plaintiff, to pay the plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., to receive which of the defendant the plaintiff then and there wholly refused. Upon which, issue being joined, the jury found,

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That the defendant did not owe any part of the money demanded, except as to the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c.; and as to the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., that Richard Tabram, the attorney of the defendant, by the direction and on the behalf of the defendant, on the 25th of May, 1833, and before the levying of the said plaint by the plaintiff, called at the plaintiff's shop in Cambridge, to pay the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., and had the money in his pocket for that purpose. That Tabram then and there saw the plaintiff in his shop, and addressed him, and said that he, Tabram, had called on the plaintiff to pay him a debt of 1*l.* 12*s.* 5*d.*, which the defendant owed to him; that Tabram mentioned that precise sum to the plaintiff; and that Tabram, at the same time, put his hand in his pocket for the purpose of taking out the said money, but did not actually produce the same: whereupon the plaintiff, in answer, said, "I can't take it, (meaning the said 1*l.* 12*s.* 5*d.*,) the matter is now in the hands of Mr. Cooper;"

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who, the plaintiff stated, was the clerk of Mr. Cannon, his attorney. That Tabram promised to see Cooper, and went away for that purpose; but having met and conversed with another person, he forgot to do so, and did not see Cooper. But whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the defendant did tender and offer to pay to the plaintiff the said sum of *1*l.* 12*s.* 5*d.*, parcel, &c., in manner and form as the defendant had above in his plea alleged, the jurors were altogether ignorant, and therefore prayed the advice of the Court.

The Court below gave judgment for the defendant.

Stephen, Serjt. for the plaintiff:

The finding of the jury does not support the plea of tender; and the judgment below must be reversed. The money should have been actually produced, or it should have been found that the plaintiff dispensed with its actual production; and, in that case, such dispensation should have been specially pleaded. *Dickinson v. Shee* (1) is in point. There, to prove the tender, the defendant gave in evidence, that he and a friend had gone to the chambers of the attorney for the plaintiff, and said, that he was come to settle with him the account of the plaintiff: that he produced a paper containing a statement of the account, in which he made the balance 5*l.* 5*s.*, which he said he was ready to pay; but he produced no money or notes. The plaintiff's attorney said he could not take that sum, as his client's demand was above 8*l.* And Lord KENYON said, "That when there was a dispute as to the amount of the demand, the plaintiff, by objecting to the *quantum*, might dispense with the tender of the actual, or of any specific sum: there should, however, be an offer to pay by producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money, as he would not accept it; for, though the plaintiff might refuse the money at first, if he saw it produced, he might be induced to accept of it." To the same effect are *Leatherdale v. Sweepstone* (2), *Thomas v. Evans* (3),

(1) 4 Esp. 68.

(2) 33 R. R. 678 (3 Car. & P. 342).

(3) 10 R. R. 229 (10 East, 101).

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Firth v. Purvis (1), *Suckling v. *Coney* (2), and Com. Dig. Pleader, 2 W. 28. In *Douglas v. Patrick* (3) the defendant pleaded, and established, that he was discharged by one of the plaintiffs from making the tender. In *Read v. Goldring* (4) the defendant's agent pulled out his pocket-book, but the plaintiff refused to adjourn to a neighbouring house to receive the money. In *Kraus v. Arnold* (5) there was nothing that approached a legal tender.

Butt, contra :

The facts found by the jury establish a dispensation of the production of the money. The rigour of the old cases has led to great injustice, and is relaxed by later decisions. In *Read v. Goldring*, the plaintiff's refusal to adjourn when the agent pulled out his pocket-book, was held to constitute a dispensation of the actual exhibition of the money, and to make the tender sufficient. That case is not, in substance, distinguishable from the present. Proof of tender of 20*l.* 9*s.* 6*d.* has been held to support a plea of tender of 20*l.*: *Dean v. James* (6); and in *Polglass v. Oliver* (7), BAYLEY, B. said, "The party to whom a tender is made, may make good what would otherwise be insufficient, by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced: *Lockyer v. Jones* (8). There is reason and good faith in this decision; for if you objected expressly on the ground of the quality of the tender, it would have given the party an opportunity of getting other money, and making a good and valid tender."

TINDAL, Ch. J.:

The ground on which I put my judgment is very short. All the cases agree that, in *order to constitute a sufficient tender, there must be an actual production of the money, or a dispensation of such production. Here, there was no actual

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(1) 2 R. R. 637 (5 T. R. 432).

(2) Noy, 74.

(3) 1 R. R. 793 (3 T. R. 683).

(4) 14 R. R. 594 (2 M. & S. 86).

(5) 7 Moore, 59.

(6) 4 B. & Ad. 546.

(7) 37 R. R. 623 (2 Cr. & Jer. 17).

(8) 3 R. R. 682, n. (1 Peake, 239, n.).

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production. Was there any actual or implied dispensation? Upon that point the jury are silent; and the case is before us on the finding of the jury only. Now, the jury, if they were satisfied that there had been impliedly a dispensation, might have found generally for the defendant; for, according to Comyns' Digest, s. 8, "the jury may find a general verdict for the plaintiff, where the special matter found would be against him: as, in trover, on proof of a demand and refusal, they may find for the plaintiff; but if it be found specially, it will be adjudged no conversion: *vide* Action upon the Case upon Trover, (E). On proof of a voluntary feoffment to a son, the jury may find it fraudulent as to creditors, &c.; but if it be found specially, it will not be judged so." But, here, they have stated the special matter without finding any actual or implied dispensation. The judgment of the Court below, therefore, must be reversed.

GASELEE, J.:

I am of the same opinion. The jury, upon these facts, might have found for the defendant on the ground of a dispensation, as in trover they may find a conversion from the circumstances of demand and refusal; and had they found a dispensation, the Court would not have interfered. But no such fact being found, and no money having been produced, the judgment must be reversed.

VAUGHAN, J.:

I regret that I feel myself bound to come to the same conclusion. The cases cited for the plaintiff were nearly all considered in *Lockyer v. Jones*; and it was said by MANSFIELD, Ch. J., in a later case, that great importance was attached to the production of *the money, as the sight of it might tempt the creditor to yield.

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BOSANQUET, J.:

I agree with the rest of the Court, on the ground that this objection arises on the finding in the special verdict, although I am not prepared to say the circumstances might not have warranted the jury in finding for the defendant.

Judgment reversed.

FLIGHT *v.* BOOTH (1).

(1 Bing. N. C. 370—379; S. C. 1 Scott, 190; 4 L. J. (N. S.) C. P. 66.)

The particulars of sale of certain leasehold premises in Covent Garden, stated, that under the original lease “no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter.”

The original lease, when produced, appeared to prohibit the businesses of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working hatter, and many others, and the sale of coals, potatoes, or any provisions: Held, that there was such a material discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract, notwithstanding a condition that errors of description should not vitiate the sale, but should be a subject of compensation.

THIS cause having, by consent of parties, been referred to arbitration under an order of Nisi Prius, the arbitrator found, in a special award,

That the declaration in this action was for money paid by the plaintiff for the defendant's use, and for money received by the defendant to the plaintiff's use, to which the general issue was pleaded; and the action *was brought to recover the sum of 100*l.* paid by the plaintiff as a deposit on the purchase by auction of certain premises situated in the Piazza, Covent Garden, and held under a lease from the Duke of Bedford. The premises were described in the printed particulars of sale, on the back of which the plaintiff had signed the memorandum of the contract, as calculated for an extensive business in carpets, haberdashery, drapery, paper, floor-cloth, upholstery, grocery, tea trade, or coach-building. It was also stated in the same particulars, that, by a clause in the lease, “the lessee is to insure the premises for 3,000*l.*, and no offensive trade is to be carried on; they cannot be let to a coffee-house keeper, or working hatter.” Printed conditions of sale followed; and by the sixth it was provided, that if, through any mistake, the estate should be improperly described or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate

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(1) Cited and applied by STIRLING, *Re Fawcett and Holmes' Contract* (1889) 42 Ch. Div. 150, 58 L. J. Ch. 763.—R. C.
J. in *Re Davis and Cavey* (1888) 40 Ch. D. 601, 608, 58 L. J. Ch. 143, 147; and by Lord ESHER, M.R. in

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the sale, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money, as a compensation either way. By the last condition it was, among other things, provided, that if the purchaser should neglect or fail to complete the purchase within a day, which had expired previously to the commencement of the action, the deposit money should become forfeited to the vendor. The sale took place, and the contract was signed, on the 16th of May, 1833. On the 10th of June an abstract of title was delivered by the vendor's solicitor to the plaintiff's, which contained the following note of the proviso hereinafter set out,—“proviso for re-entry in case of non-payment of rent, or non-performance of covenants, or carrying on any particular trade without a licence for that purpose under the hand of the Duke of Bedford first had and obtained.” At the date *of the sale and contract the lease was a valid and subsisting one. The plaintiff's solicitor made several objections upon the abstract to the completion of the purchase, which the arbitrator found to have been either insufficient in themselves or satisfactorily removed; but the plaintiff's solicitor never required to see the lease. And on the 15th of July the plaintiff, so far as in him lay, rescinded the contract; and having demanded back again the deposit, without success, brought the action in question.

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At the trial of the cause the lease was produced, and appeared to contain the following proviso: “Provided always, that if the yearly rent hereby reserved, or any part thereof, shall be unpaid for fifteen days next after any of the said days of payment; or if, at any time during the continuance of the said term, the trades or businesses of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-monger, fruiterer, herb-seller, coffee-house keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter, or any or either of them, shall be used or exercised in or upon the said demised premises, or any part thereof; or any auctions or public sales of household goods, or other things, be made in or upon the said premises or any part thereof; or the same be used as a shop or place for the sale of coals, potatoes, or any provisions whatever;

or if the lessees, their executors, administrators, or assigns, shall, at any time during the last seven years of the said term, assign or set over this indenture, or any part of the premises, and their estate and interest therein, without a licence for that purpose under the hand of the said duke, his heirs or assigns; or on breach or non-performance of any or either of the covenants and agreements hereinbefore contained; then and thenceforth, and in either of *such cases, it shall be lawful for the said duke, his heirs and assigns, to re-enter."

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It was not proved before the arbitrator that the plaintiff, at the time of the sale, or of the signing the contract, had ever seen the lease or heard it read, or that he or his solicitor were aware of the terms of the proviso until the day of the trial. Evidence was offered, on the part of the defendant, to prove that the lease was produced at the sale, and that the proviso had been publicly read. That evidence was objected to on the part of the plaintiff's counsel; the arbitrator received it only to negative any wilful concealment or misrepresentation by the defendant of the terms of the lease; and found that none such was proved against him. No claim was made by the defendant, before the arbitrator, for damages for the non-performance of the plaintiff's contract, nor any attempt to compel a specific performance.

Upon these facts, the arbitrator found that the plaintiff had good cause of action against the defendant, and ordered that the verdict should be reduced to the sum of 100*l.*; for which sum, and the costs of the cause when taxed, he directed that the plaintiff should be at liberty to sign judgment on the sixth day of Trinity Term then next ensuing, and not before. And if the facts above set out did not authorize the plaintiff, in the opinion of the Court, to rescind the contract of sale, then the arbitrator directed the verdict to be entered for the defendant, and that he should be at liberty to enter up the judgment for himself.

Taddy, Serjt. obtained a rule *nisi* to enter up judgment for the defendant under this award, contending, that if there had been any misdescription of the premises at the auction,

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it was a misdescription originating from inadvertence, and not from fraud or any intention to *mislead; and that, under such circumstances, though the plaintiff might require compensation for any difference in value between the representation and the reality, yet he could not rescind the contract: *Duke of Norfolk v. Worthy* (1), *Wright v. Wilson* (2), *Stewart v. Alliston* (3), *Trower v. Newcombe* (4).

Wilde, Serjt. shewed cause:

Where the misdescription, whether proceeding from intention or inadvertence, is such that the purchaser finds himself in possession of a thing materially differing from that which he proposed to buy, he is at liberty to rescind the contract: *Jones v. Edney* (5), *Waring v. Hoggart* (6), *Coverley v. Burrell* (7), *Brealey v. Collins* (8). Here the plaintiff could never have inferred from the particulars prohibiting offensive trades and the business of coffee-house keeper and hatter, that he should be prevented from selling fruit or vegetables in a district devoted to that line of business. There is no principle upon which, in such a case, compensation can be calculated: *Sherwood v. Robins* (9). The object of the purchaser is entirely defeated, and he can only be indemnified by rescinding the contract. In *Tomkins v. White* (10), Lord ELLENBOROUGH said, "A little more fairness on the part of auctioneers in the forming of their particulars would avoid all these inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and, in favour of justice, considering how little knowledge the parties have of the things sold, much more particularity and fairness might be expected of them." *In *The Duke of Norfolk v. Worthy* the jury found that the misdescription was wilful. *Trower v. Newcombe* only decided that *bona fides* is not to be impeached by the mere babble of an auction room. But *Stewart v. Alliston* is in favour of the plaintiff.

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(1) 10 R. R. 749 (1 Camp. 337).

(2) 1 Moody & Rob. 207.

(3) 15 R. R. 81 (1 Mer. 26).

(4) 17 R. R. 171 (3 Mer. 704).

(5) 13 R. R. 803 (3 Camp. 285).

(6) 1 Ry. & M. 39.

(7) 24 R. R. 350 (5 B. & Ald. 257).

(8) Younge, 317.

(9) Moo. & Mal. 194.

(10) 8 R. R. 732 (3 Smith, 435).

Taddy and Cresswell, in support of the rule :

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As to the possibility of the plaintiff's intending to deal in vegetables, the alleged misdescription could not have misled him, for the house is not described as situated in the market, but in the piazza; and the rule, *caveat emptor*, applies. The lease was read by the auctioneer, and the plaintiff might have required to inspect it. Even where property is held under a lease containing covenants contrary to custom, a purchaser is not entitled to compensation if he knew of the existence of the lease: *Hall v. Smith* (1), *Walter v. Maude* (2). The arbitrator having found that there was no fraud, the plaintiff could not rescind the contract: *Oldfield v. Round* (3), *Scott v. Hanson* (4). If there be any misdescription, the conditions of sale expressly entitle him to compensation, and *Drewe v. Hanson* (5) shews the principle on which it may be estimated.

Cur. adv. vult.

TINDAL, Ch. J. :

The question in this case arises upon the special facts found by the arbitrator on his award: and it is this, whether the plaintiff was at liberty under the circumstances stated in the award to consider the contract of sale to be rescinded. For if rescinded, the plaintiff is entitled to recover the deposit as money had and received to his use; but if the contract is still unrescinded *and open, the present action is not maintainable, but whatever injury the plaintiff has sustained by the misdescription must form the subject of a special action on the contract of sale.

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Now the arbitrator having expressly found that no wilful concealment or misrepresentation was proved against the defendant, we must consider the case as standing clear from any fraud, and take the misdescription of the premises to have originated either from ignorance, inadvertence, or accident.

The question, therefore, is narrowed to the single point, whether the misdescription in the printed particulars of sale

(1) 9 R. R. 313 (14 Ves. 426).

(4) 27 R. R. 141 (1 Sim. 13).

(2) 21 R. R. 141 (1 Jac. & W. 181).

(5) 6 Ves. 675.

(3) 5 R. R. 107 (5 Ves. 508).

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of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether; or whether it was such as was contemplated by the sixth condition of the printed particulars of sale, by which it was provided, that "if through any mistake the estate should be improperly described, or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale thereof; but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money as a compensation, either way."

It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, *however gross, shall avoid the contract, but shall form the subject of compensation only: *Duke of Norfolk v. Worthy* (1), *Wright v. Wilson* (2); whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale: *Jones v. Edney* (3), *Waring v. Hoggart* (4), and *Stewart v. Alliston* (5). In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts,

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(1) 10 R. R. 749 (1 Camp. 337).

(2) 1 Moody & Rob. 207.

(3) 13 R. R. 803 (3 Camp. 284).

(4) Ry. & M. 39.

(5) 15 R. R. 81 (1 Mer. 26).

the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney*, where the subject-matter of the sale was described to be "a free public house," while the lease contained a proviso that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal.

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In the case under discussion the particulars represent the house as calculated for an extensive business in various trades therein enumerated; to which it was added, "that no offensive trades are to be carried on: the premises cannot be let to a coffee-house keeper or working hatter." Any person reading this particular, and having no information but what he derives from it, that is, perhaps, every person attending the sale, would conclude, that he was not prevented by the terms of the lease from carrying on any trade in it, except those which were of a class generally acknowledged to be offensive, and the two enumerated trades of coffee-house keeper and working hatter. He would never suppose, nor have any reason to suppose, that he was prevented from carrying on the trade of a baker, a fruiterer, or a herb-seller, in a house situated in the piazza of Covent Garden market, much less that the lease was to become void, if the house, so situated, was used as a place for the sale of any provisions whatever. The latter restriction would extend to prevent trades of the most innocent and inoffensive kinds from being exercised on the premises; such as a flour factor, a biscuit seller, or the like; yet such are the restrictions found to exist in the lease when it is first submitted to the inspection of the purchaser. Under these circumstances, it appears to us, that a lease which is described as containing a restriction against offensive trades, and a lease containing restrictions not only against offensive trades but also against some trades that are inoffensive, are not one and the same thing, but a different subject-matter of contract; and that where a man purchases by the former description, it may very well be supposed that he would not have become the purchaser, whether he bought for the purpose of carrying on trade upon the premises himself, or for a money investment, if he had known the lease had

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contained the larger and more extensive restrictions ; and, indeed, the very terms of the sixth condition of sale scarcely apply to a case where the difference of value is so uncertain and arbitrary as in the present case. The condition, that the parties are to pay or allow a proportionate value according to the average, will comprehend a case where there is half an acre more or less than is described, or cases which resolve themselves into simple calculations of that nature ; but how will it govern such a misstatement as the present ? What *action at law can be framed upon it ? It would at least involve the purchasers in great difficulties. The lease being in the hands of the vendor, he had peculiarly, and indeed exclusively, the means of knowledge of the exact restrictions contained in it ; the purchaser at the auction had none. For the reading the lease at the auction by the auctioneer has been decided to be no excuse for a misdescription of the terms of the lease in the particulars of sale. And as to any *laches* on the part of the purchaser in not sooner demanding an inspection of the lease, which was urged as an argument on the part of the defendant, he had not the most distant reason to suspect any misdescription, until the abstract was delivered, and then the suspicion would come too late ; for the question is, whether he was bound or not at the time the contract was made. If, indeed, there had been any waiver of the objection in this case, our decision would have been different ; but a waiver should have been found by the arbitrator : and so far as can be inferred from the facts found upon the award, the lease was never seen by the purchaser, nor the objection ever taken, until the trial of the cause. He stood then, as he might do, upon his legal right to recover the deposit.

Upon the whole, we see no reason to be dissatisfied with the arbitrator's award, and therefore the rule for entering the verdict for the defendant must be discharged.

Rule discharged.

DENNETT *v.* PASS AND BARTON (1).

(1 Bing. N. C. 388—399; S. C. 1 Scott, 218; 4 L. J. (N. S.) C. P. 70.)

A rent charge is extinguished by a devise, to the grantee, of part of the land out of which the rent charge issues, notwithstanding the devise is expressly made over and above the rent charge.

When a charge on the land is clear, and upon the construction of a will it is doubtful whether or not the testator meant to transfer the charge from the realty to the personalty, it will be held to continue a charge on the land.

THIS was an action of replevin tried before Bayley, B., Chester Spring Assizes, 1833, when a verdict was found for the defendants, subject to the opinion of the Court upon the following case:

The declaration was for the taking the goods and chattels of the plaintiff in the township of Thelwall, in the parish of Run-corn and county of Chester. There were two avowries by the defendant Mary Barton in her own right, and the defendant Pass as her bailiff. The first avowry justified the taking as for a distress for six years' arrears of an annuity or rent charge of 200*l.* issuing out of the places in which, &c. among other property, and alleged to be due to the said defendant Mary Barton by virtue of a settlement in bar of dower executed by her husband Thomas Pickering in 1775, with power to enter on non-payment. The second avowry justified the taking as for a distress for six years' arrears *of an annuity or rent charge of 20*l.* issuing out of the same property, and alleged in the like manner to be due to the defendant M. Barton under the will of her husband. The plaintiff by his pleas in bar denied that M. Barton was seised of the annuities.

Thomas Pickering being seised in fee of the premises, on the 9th and 10th of May, 1775, by deed of settlement and jointure, in bar of dower, conveyed all his manor, lands, &c., in Chester and Lancaster to S. Egerton and J. Way, to various uses during his life, and after his decease, to the use, intent, and purpose, that Mary Pickering, if she survived him, should receive an annuity of 200*l.* a year for life, payable out of and chargeable,

(1) This case must now be considered in relation to the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35, s. 10). And see *Booth v. Smith* (1884) 14 Q. B. Div. 318, 54 L. J. Q. B. 119.—R. C.

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and charged upon the said manor and lands, &c., in the name and in nature of a jointure in bar of dower, with power of entry to M. P. in case the annuity should be in arrear: subject thereto, to the use of such children as the said T. P. should by deed or will appoint; and in default of appointment by him, as M. P. should appoint: in default of appointment by either, equally amongst the children; and in default of issue, to such uses as T. P. should by deed or will appoint, with ultimate remainder in fee to T. P. and power to T. P. to charge by deed or will to the amount of 15,000*l.* subject to the annuity.

In June, 1775, T. P. by his will,—reciting that he had conveyed all his real estates at Thelwall and elsewhere in the county of Chester and Lancaster, unto S. Egerton and J. Way, upon the trusts, and to and for the purposes therein mentioned, with a power to raise and appoint any sum or sums of money not exceeding 15,000*l.*, or annuities as therein mentioned, to be paid and applied by the said S. Egerton and J. Way, as he should by his last will and testament direct and appoint,—“charged all his real estates, except the house and premises given to his wife for life, with the payment of the sums of money and annuities mentioned in his will; and directed his trustees to raise those sums of *money and annuities by mortgage;” and, first, an annuity of 20*l.* to his wife, M. P., for life, over and above what he had already settled upon her. He then devised to his wife his mansion house at Thelwall for life; and also the lands and premises that he then occupied there, being about six or seven fields.

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By a codicil of the 5th of December, 1775, after revoking a devise of his real estate to T. P. of C., and subject to the specific and pecuniary legacies in and by his said will, and in that codicil bequeathed, and not thereby revoked, he gave and bequeathed all the rest, residue, and remainder of his personal estate unto his nephew H. P., to and for his own proper use and benefit: but if his personal estate and effects, not specifically bequeathed, should be insufficient to pay all his just debts, funeral expenses, and the pecuniary legacies therein-before in his said will mentioned, and in case he should happen to die without issue, or there being such, they should happen to die

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without issue, he gave and devised all that his manor or lordship of Thelwall, and all and every his messuages, lands, tenements, and hereditaments, situate, lying and being in Thelwall aforesaid, or elsewhere, and every part and parcel thereof, with their and every of their appurtenances, subject to the provisions which, in and by the said will, he had made for his loving wife, to the several uses, intents, and purposes thereafter mentioned; that is to say, to the use of his said nephew, H. P., for life, remainder to his issue in tail, with power to H. P. to jointure; so as such limitation or appointment of such jointure should be without prejudice to the provision which, in and by his said will, he had made for his loving wife.

By a second codicil, he provided that as he had left his dear Mrs. Pickering the hall of Thelwall, and all the lands he then held, for her life; and as it was not intended she should cut down any timber on the premises, *so it was his will and intention that she should have timber from the premises she was to occupy, or any other part of the estate, for gates and stiles, or to repair.

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On the 23rd of July, 1776, the said Thomas Pickering died, without having altered or revoked the said will and codicils, leaving his wife, the defendant, who afterwards, by another marriage, became M. Barton, him surviving and without issue.

After his death the defendant, M. Barton, entered into or continued in possession under and by virtue of the said devise of the mansion house and out houses at Thelwall, which the testator lived in at the time of making his will, with the garden, orchard, fields, and also the lands and premises which the testator occupied at the time of making his said will, being about six or seven fields, and took and enjoyed the rents and profits from thence hitherto.

The mansion-house and premises were, and still are, a part of the said manor or estate of Thelwall, upon which the said annuity of 200*l.* was, by the said indentures of lease and release, charged. No payment had been made for the six years preceding the distress, to the defendant Mary Barton, in respect either of the said annuity of 200*l.*, or of the said annuity of 20*l.*

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The question for the opinion of the Court was, whether the said annuity or rent-charge of 200*l.* was extinguished by the devise to the said M. Barton of a part of the premises upon which the annuity was charged, or out of which the rent-charge was to issue; and by the acceptance of M. Barton of that devise.

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If the Court should be of opinion that the annuity was not extinguished, then the verdict was to stand for the defendant's arrears of 1,200*l.*; but if the Court should be of opinion that the annuity was extinguished, then *a second question arose, whether the defendants were justified in making the distress in respect of the annuity of 20*l.* granted to the defendant, M. Barton, by the above recited will and codicils; and if the Court should be of that opinion, the verdict was still to stand for the defendants, but the arrears were to be reduced to 120*l.* If the Court should be of a contrary opinion, the verdict entered for the defendants was to be set aside, and a verdict entered for the plaintiff, with 3*l.* damages.

This case was argued twice. In Trinity Term by *J. Jervis* for the avowant, and *Lloyd* for the plaintiff, and in Michaelmas Term by *Taddy*, Serjt. for the avowant, and *Lloyd* for the plaintiff.

Arguments for the avowant:

The 200*l.* annuity was not extinguished by the devise of a portion of the land on which it was charged. It is true, that if a party who has a rent-charge issuing out of land purchase any part of the land, the rent-charge is said by Littleton to be extinguished: Litt. s. 222. But the word "purchase," though said by the text-writers to include all modes of acquisition except descent, could not have been used by Littleton in so wide a sense, but must rather have been applied to conveyances arising exclusively out of the spontaneous act of the party. A devise was not a mode of conveyance known at common law; and it transfers the estate partly by operation of law and partly by act of the party; for to some purposes the estate is in the devisee before acceptance. Now, in dower, the act of the widow

concur with the act of law, and yet the incidence of dower does not extinguish a rent-charge belonging to the widow: Co. Litt. 150 a; the rent-charge shall be apportioned. And other instances are pointed out by Lord Coke, where the rent shall be apportioned, notwithstanding a part of the land come to the owner of the rent partly by his own act: Co. Litt. 147 b, 148 a, *Bac. Abr. Rent, N. A devise is taken as a benevolence: *Vernon's case* (1): all the devisee does is to concur. The devise is not pleaded with an acceptance; it is complete unless the devisee refuses. In *Knights v. Calthorpe* (2) and *Slatter v. Buck* (3), the heir applied for relief against a jointress, under circumstances like the present, and was refused.

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And this is not so much a rent-charge as a rent in lieu of dower. Lord Coke says a rent-charge is against common right, and must be strictly pursued; it is opposed to rent service; but a rent for jointure stands on the same footing as dower, which is favoured in law.

Secondly, it is clear that the devisor did not intend that this annuity should be extinguished. The devise is expressly given over and above what is provided by the settlement. The power of charging the land was, in its creation, subject to the wife's annuity: the testator devises under the power, and he could only charge subject to the power. The will is, in fact, only the execution of the power, and so, may be said to form part of the original deed: *Venables v. Morris* (4).

At all events, the devise was a regrant of the annuity. Lord Coke says (Co. Litt. 147 b), "If the grantee of a rent-charge purchase parcel of the land, and the grantor by deed reciting the said purchase of part, granteth that he may distreyne for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent, or the same in quantity. And so it is if a man by deed granteth a rent-charge out of his land to a man for life, and granteth further by the same deed that he and his heires may distreyne in the land for the same rent, this amounteth to a new grant of a rent in fee simple."

(1) 4 Co. Rep. 3.

(2) 1 Vern. 347.

(3) Moseley, 256.

(4) 4 R. R. 455 (7 T. R. 342).

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As to the annuity of 20*l.*, the objection of extinguishment *does not arise, the charge being on property other than that devised to the wife.

Arguments for the plaintiff:

The devisee was a purchaser in the ordinary sense of the word. She was not bound to take possession, and by electing to take under the will she took by her own act, and not by operation of law.

As to the devisor's intention, it is immaterial what his intention was. The question is, what are the legal rights of the parties after the annuitant has taken as a purchaser, part of the lands charged. And the devise does not appear to have been made under the power in the marriage settlement; for that settlement contains a power to charge and a power to devise; the testator, in his will, recites the power to charge, and charges, but does not advert to the power to devise.

Nor can the devise be construed as a re-grant of the annuity for which the defendants have avowed; that annuity is described in the avowry as an annuity charged on all the testator's lands, whereas the re-grant now set up is a grant of an annuity charged on all the testator's lands, *minus* that portion of them devised to the avowant.

With respect to the annuity for 20*l.*, it is a charge on the personalty and not on the land. By the power in the marriage settlement, the devisor had an alternative, either to charge the land, or raise 15,000*l.* in a gross sum: having adverted to that power, having directed his trustees to raise the annuity by mortgage, and having given no power of distress, he must be taken to have intended a charge on the personalty: *Marnell v. Blake* (1).

[*395] In reply it was urged, that the language of the pleadings did not exclude the supposition of a re-grant, for the avowry set out the original deed of settlement; and *the will being the execution of the power given by the deed, operated upon all the lands the testator had at the time of its execution.

As to the annuity for 20*l.*, it was expressly charged on the land; the direction to mortgage was only by way of further security. Distress is incident to such a charge, whether expressed in the devise or not: *Buttery v. Robinson* (1).

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Cur. adv. vult.

TINDAL, Ch. J.:

The questions which have been argued in this case are two: one, whether Mary Barton the avowant, was seised of the annuity or yearly rent-charge of 200*l.* per annum for her life, at the time of the distress made; the other, whether she was seised of the annuity or yearly rent-charge of 20*l.*: both which questions are raised by traverses for that purpose, in the pleas in bar by the plaintiff to the avowries.

As to the annuity or rent-charge of 200*l.*, the question is, whether it is extinguished by the devise to the grantee of the annuity of part of the land out of which such annuity or rent-charge issues, coupled with the acceptance of such devise. And we are of opinion that such is the necessary legal consequence to be drawn from the facts stated in the case.

By the settlement made in May, 1775, the avowant, then the wife of Mr. Pickering, became seised for the term of her natural life of a rent-charge or annuity of 200*l.* per annum, issuing out of the manor of Thelwall, and the lands belonging to the same; and under the will of the settlor, who died within a year after the settlement made, she became entitled, for the term of her natural life, to the mansion-house at Thelwall and the lands occupied therewith, being part of the premises out of which the rent-charge issued, into which she entered after her husband's death.

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The rule of law is laid down in Litt. s. 222, in these terms, "If a man hath a rent-charge to him and his heirs, issuing out of certain land, if he purchase any parcel of this to him and his heirs, all the rent-charge is extinct, and the annuity also, because the rent-charge cannot by such manner be apportioned." And the reason of this rule of law is very fully explained by Lord Chief Baron GILBERT, upon feudal principles. See his Treatise on Rents, p. 151.

(1) 28 R. R. 656 (3 Bing. 392).

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On the part of the avowant it is contended, that the present case does not fall within the principle above laid down, upon several grounds. In the first place it is said, that this is not a purchase within the meaning of the term in the section above referred to. But when it is considered that Littleton has before, in sect. 13, defined purchase to be "the possession of lands and tenements that a man hath by his deed of agreement, into which possession he cometh not by title of descent from any of his ancestors or of his cousins, but by his own deed;" and when Lord Chief Justice Coke, in his commentary on that section, explains it to be "always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or freely of gift; for that is in law also a purchase," there is no ground for contending that a devisee, who enters and enjoys the subject-matter of the devise, can be any other than a purchaser within the meaning of the section first above referred to. And again, Littleton himself, in sect. 224, takes the express distinction between the case where the land comes to the grantee by his own act, and where by descent and by course of law; in which latter case the rent-charge shall be apportioned. And as to the cases cited by the avowant's counsel from 1 Vern. and from Moseley's Reports, they *were not cases where the heir or devisee of the land chose to stand upon the strict legal doctrine of extinguishment, but applied to the court of equity for aid and assistance against the jointress, which was refused by that Court.

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It is argued in the second place, that the devise of the land is expressly made over and above the rent-charge; and that such intention of the devisor ought to prevail; but the question before us is not a question of intention, but a question as to the strict legal rights of the parties under the circumstances of the case.

It is then argued, that the devise is made under a power given under the same settlement which creates the rent-charge, and it is urged that the case must be considered the same as if the provisions of the will made in execution of the power had been inserted in the settlement itself; in which case it is contended, that if the grant of the rent-charge, and the conveyance of part of the land out of which such rent-charge issues, had been by the

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same deed, no extinguishment could reasonably be supposed to take place. No authority is cited for this position; and even admitting the law to be correctly stated, upon reference to the will, the devise in question does not appear to be made under the power of appointment reserved to the settlor in the event of his dying without issue, but to take effect out of the ultimate remainder in fee limited to him by the settlement: for the power recited in the will is the power to charge, and not any power to appoint by deed or will; the charge on the estate is therefore made in execution of the power so recited, but the devise of the lands is not made under any power at all, but is a direct devise of the land itself.

It is urged lastly, that whatever may be the effect of the devise as to creating an extinguishment, yet, the will is in effect a re-grant of the rent-charge of 200*l.*, as *it treats that rent-charge as still actually subsisting; for the devise of the rent-charge of 20*l.* is expressed to be “over and above what I have already settled upon her.” But it is unnecessary to determine whether such construction of the will can be sustained or not; for if that construction be adopted, still the rent-charge of 200*l.* per annum cannot be supposed to issue out of those lands which by the will are expressly devised to the wife, but out of the residue of the lands from which it was made to issue in its original creation. It is not, therefore, the rent-charge described in the avowry, which is made to issue out of the manor and all the lands of Thelwall, for it issues out of the manor, and all the lands, with the exception of those devised to the widow of the testator.

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As to the annuity of 200*l.* therefore, we think the issue upon the seisin of the rent-charge, as taken upon these pleadings, ought to be found for the plaintiff.

As to the rent-charge of 20*l.* first devised by the will of Thomas Pickering, inasmuch as the devise is so worded as to make the rent issue out of all the lands, save and except those devised by the same will to the wife, it is free from the objection taken as to the rent-charge of 200*l.* But the objection taken to the seisin of this rent-charge is, that although at first it is made a charge upon the realty, yet the proper construction of the codicils to the will is, to transfer it from the realty to the personal estate. We

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think, however, this is far from being clear; the construction of the will being quite compatible with the continuance of the rent-charge of 20*l.* per annum as a charge upon the land. Inasmuch, therefore, as the original charge on the land is clear, and the exemption of the land from this charge, and the transfer of it to the personalty is subject to considerable doubt and difficulty, we think it must be held still to continue a charge upon the land.

[399] The result is, that we think judgment ought to be given for the plaintiff, on the issue raised as to the seisin of the 200*l.* rent-charge; but for the avowant, as to the rent-charge for 20*l.* per annum.

Judgment accordingly.

1835.
Jan. 14.
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CRANCH *v.* WHITE.

(1 Bing. N. C. 414—421; S. C. 1 Scott, 314; 1 Hodges, 61; 4 L. J. (N. S.) C. P. 113; 3 Dowl. P. C. 377; S. C., at Nisi Prius, 6 Car. & P. 767.)

R. being employed to procure a bill of exchange to be discounted for plaintiff, instead of doing so, indorsed it, and placed it in the hands of defendant, who was clerk to a creditor of R. Defendant carried the bill to R.'s account with his creditor, and though afterwards apprised of the circumstances under which R. held the bill, refused to restore it: Held, that defendant was liable to plaintiff in trover.

TROVER for a bill of exchange of 200*l.*, dated July 13th, 1833, drawn by the plaintiff on and accepted by James Plimpton, payable four months after date; and indorsed by the plaintiff, by Boyn & Co., and by Roberts.

[*415] The defendant acted as clerk to his mother, who carried on the business of a coal-merchant. Roberts, *who was employed by the plaintiff to get the bill discounted, owed the defendant's mother a considerable sum for coals, and instead of procuring the bill to be discounted, indorsed it, and placed it in the hands of the defendant, who carried it to the credit of Roberts's account with his mother.

The defendant was afterwards apprised that Roberts had only been employed to get the bill discounted, and was requested to give the bill up; but he refused to do so, saying, he had placed it to his mother's account.

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The acceptor afterwards refused payment to the defendant or his mother.

At the trial before Tindal, Ch. J., a verdict was found for the plaintiff, which

Atcherley, Serjt. moved to set aside, on the ground that the action ought to have been brought against the mother of the defendant, and not against the defendant; that if the plaintiff had declared in assumpsit on an alleged contract to discount the bill or to redeliver it, the action must have been against the mother the principal, and not against the defendant, who was only her clerk, and known at the time to Roberts to be so; and that the plaintiff by declaring in trover instead of assumpsit, could not vary the liability of the parties: *Powell v. Layton* (1), *Jennings v. Rundall* (2). Secondly, that the refusal to deliver up the bill, did not amount to evidence of conversion of the bill by the defendant; for he had not the legal control over the bill, which was in his custody merely as clerk or agent, and not on his own account. If this bill had been paid by the acceptor, an action for money had and received would not have lain against the defendant, it must have been brought against the mother. Thus in *Stephens v. Badcock* (3), an attorney *who was accus-

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(1) 9 R. R. 660 (2 Bos. & P. (N. R.)
365).

(2) 4 R. R. 680 (8 T. R. 335).

(3) 37 R. R. 448 (3 B. & Ad. 354).

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In the present case there is no privity of contract between the plaintiff and defendant; and if the defendant be not liable in assumpsit, neither is he in trover.

TINDAL, Ch. J. :

Two objections have been made to the verdict in this cause, which has been given for the plaintiff: first, that according to the facts proved at the trial, the action has been misconceived, and should have been assumpsit instead of trover; and, secondly, that even if trover lies, the action should have been brought against the defendant's mother, for whose benefit the note was received.

[*417] With respect to the first objection, that the action should have been conceived in contract instead of tort, let us see what are the facts. The defendant acted as clerk to his mother, who carried on the business of a coal-merchant: Roberts, who was employed by the plaintiff to get the bill discounted, owed to the defendant's mother a considerable sum for coals; and instead of procuring the bill to be discounted, indorsed it and *placed it in the hands of the defendant, who carried it to the credit of Roberts's account with his mother. The defendant was afterwards apprised that Roberts had only been employed to get the bill discounted, and was requested to give the bill up; but he refused to do so, saying he had placed it to his mother's account. The acceptor afterwards refused payment to the defendant or his mother.

What evidence is there here of any contract on the part of the defendant? But it is said that if the acceptor had paid the bill, the defendant's mother would have been liable to the plaintiff in an action of assumpsit for money had and received; and that a plaintiff cannot, by changing the form of action, deprive a defendant of any advantage to which he is fairly entitled. I agree in the latter proposition. In *Powell v. Layton*, it was held that to an action on the case in the form of tort, against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant might plead in abatement that the goods were delivered to him and his partners jointly, and that his partners were not sued. So in *Jennings v. Rundall*, it was held that a

plaintiff could not convert an action founded on a contract into a tort, so as to charge an infant defendant; and that, therefore, where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending, &c., wrongfully and injuriously rode the mare so that she was damaged, &c., the defendant might plead his infancy in bar, the action being founded on a contract.

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Those two cases, however, do not decide that the form of action had, under the circumstances, been misconceived, and that the plaintiffs, as it is contended here, ought to have been nonsuited, but merely that the *defendants were entitled to be let into the same defence as if the actions had proceeded on the contract. What difference would it have made to the defendant in this action,—what better answer would he have had to the charge made against him, even if the plaintiff had declared upon an implied contract to redeliver the bill?

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Then, if the action be not misconceived in trover, has the defendant been improperly sued instead of his mother? The general rule is, that in actions of tort all persons concerned in the wrong are liable to be charged as principals. In *Perkins v. Smith* (1), it was held that trover lay against a servant who disposed of goods the property of another to his master's use, whether he had any authority or not from his master for so doing. It was objected that the action was improperly brought against the servant Smith, who acted wholly in that matter for his master, and that the conversion was found to be to the use of his master, which was the gist of an action of trover; that applies to the point now under discussion; and LEE, Ch. J. said, "the point is, whether the defendant is not a tort-feasor, for if he is so, no authority that he can derive from his master can excuse him from being liable in this action." To apply that doctrine here, the son standing in his mother's shop, cannot justify a wrong under any authority from his mother.

Next, it is said there was no evidence of any conversion. But a demand and refusal, when not met with any counter evidence, amounts to a conversion. Lord Coke says (2), "That if A. brings

(1) 1 Wils. 328.

(2) 10 Co. Rep. 56.

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an action against B. upon trover and conversion of plate, jewels, &c., and the defendant pleads not guilty, now it is good evidence *prima facie* to prove a conversion, that the plaintiff requested the defendant to deliver them, and he refused; and, *therefore, it shall be presumed that he has converted them to his own use." Here the note was bailed to the defendant, and his refusal to return it, on demand, was evidence whence the jury might find a conversion. So in 1 Roll. Abr. 5, l. 45, "Si home trove mes biens et conust eux destre mon biens, et jeo eux demand de luy, et il refuse et denie a eux deliverer a moy, ceo est un conversion en ley."

According, therefore, to the facts in evidence before the jury, I think this action was maintainable; that it was properly brought against the defendant; and that any justification of his conduct as the agent of his mother falls to the ground on the authority of *Perkins v. Smith*, which has been confirmed in *Stephens v. Elwall* (1).

PARK, J.:

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The effect of the decision in *Powell v. Layton* is only that the defendant shall not, by the mere form of action, be deprived of any just answer he has to the plaintiff's claim. And in all the cases adverted to by the CHIEF JUSTICE, the circumstances were more favourable for the defendant than in the present action. In *Stephens v. Elwall*, LE BLANC, J. was, at the trial, impressed with the notion which has now been advanced on behalf of the defendant, but he afterwards acknowledged he had been mistaken. And Lord ELLENBOROUGH said, "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts amount to a conversion:" Here the defendant acted with full knowledge of the circumstances, and yet persisted in holding the note in discharge of Roberts's debt *to his mother: "For a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under authority from another, who had himself no authority to dispose of it."

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That was a much harder case against the defendant than the present; but it has always been recognised as law, and was, with the preceding decisions, confirmed in *Alexander v. Southey* (1).

VAUGHAN, J. :

I think the rule ought to be refused. This is an action of trover, and all the requisites of such an action have been complied with. There can be no doubt that the note was the property of the plaintiff, that it came into the hands of the defendant, and that he refused to restore it, or apply it in the manner required by the owner. And as to his being a servant to his mother, if he has a knowledge of what was done, he is liable to the plaintiff.

In *Stephens v. Badcock*, the clerk had received various sums from the plaintiff, and with the plaintiff's assent had carried them to his master's account, so that they could no longer be distinguished by any earmark, and the action was in assumpsit; but if it had been a bag of money, and he had refused to deliver it, it had been held in trover a conversion.

In *Sarby v. Wynne* (2), where A. deposited goods with B., and then sold them to C., and afterwards directed B. to deliver the goods to D.; it was held that B. was not guilty of a conversion in delivering them to D. But there, A. was the rightful owner when he deposited the goods with B.; whereas, in the present case, Roberts had never any right to indorse the bill to the defendant.

BOSANQUET, J. :

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Here there was a wrongful appropriation of the plaintiff's property, with a knowledge on the part of the defendant that the appropriation was wrongful, and that amounts to a conversion.

As to the form of action, assuming that an action on contract would lie, the only consequence would be, not to exonerate the defendant, but merely to enable him to object to the non-joinder of his mother, as defendant.

Rule refused.

(1) 24 R. R. 348 (5 B. & Ald. 247).

(2) Starkie, Evid. 842.

1835.
Jan. 27.

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HODGES v. EARL OF LITCHFIELD (1).

(1 Bing. N. C. 492—501; S. C. 1 Scott, 443; 1 Hodges, 40.)

Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages, expenses incurred previously to entering into the contract; nor the expense of a survey of the estate; nor the expense of a conveyance drawn in anticipation of a completion of the purchase; nor the extra costs of a Chancery suit touching the purchase, in which the vendor is defeated; nor losses sustained by the purchaser, in the resale of stock prepared for the estate. But he is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose; and interest on his deposit money.

THIS was an action of assumpsit, brought by the plaintiff to recover from the defendant damages for the breach of a special contract for the sale of an estate by the defendant to the plaintiff.

The declaration stated, by way of inducement, (amongst other things), that before the making of the promise and undertaking of the defendant thereafter mentioned, to wit, on the 7th of November, 1828, by certain articles of agreement, made and entered into between Robert *Harvey Wyatt, as agent for and on behalf of the defendant (then Viscount Anson), his heirs, executors, and administrators, of the one part, and the plaintiff for himself, his heirs, executors, and administrators, of the other part, the said R. H. W. agreed to sell, and the plaintiff agreed to purchase, the free and exclusive fishery of the defendant in the river Trent, as advertised to be sold by auction on the 21st of October then last, with the right and privilege of landing nets upon, and angling from the lands of the landowners adjoining the river, and the several farms, lands, and hereditaments, described in the schedule to the said articles of agreement, for the sum of 21,500*l.*; of which the sum of 1,500*l.* was then paid, and the sum of 20,000*l.*, the remainder thereof, was to be paid on the 25th of March then next; and if the payment should be delayed after that time, and such delay should be occasioned by the plaintiff, the plaintiff should pay lawful interest on his purchase-money from thence, until the time of final payment,

(1) See on similar point, *Bain v. Flureau v. Thornhill*, 2 W. Bl. 1078. *Fothergill* (H. L. 1874) L. R. 7 H. L. —R. C. 158, 43 L. J. Ex. 243, confirming

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and should be entitled to the rents and profits of the premises from the said 25th of March then next, to which time all outgoings would be cleared by the defendant; and it was thereby declared that an abstract of the title should be ready for delivery to the plaintiff, on or before the 25th of December then next, at Mr. Keen's office in Stafford; and if the plaintiff, or any person on his behalf, should object to the defendant's title, or require any act, matter, or thing to be done, procured, or executed, for the completion thereof, notice in writing of the particular objection or matter required should be given to Mr. Keen on or before the 21st of February then next, or otherwise the plaintiff and all persons claiming under him should waive the same, and should be held to have accepted the title: of which articles of agreement the defendant had notice. That thereupon, in consideration of the *premises, and also in consideration that the plaintiff at the defendant's request had undertaken and faithfully promised the defendant to perform and fulfil all things in the said articles of agreement contained on his part and behalf to be performed and fulfilled, the defendant then and there consented to and approved of the said articles of agreement, and then and there undertook, and faithfully promised the plaintiff that the defendant would make, or procure to be made, a good title to the said estate, free of tithes, on or before the said 25th March then next; and would perform and fulfil all things in the said articles contained on his part and behalf to be performed and fulfilled. The plaintiff then averred, that an abstract of the title to the said estate being afterwards, and before the said 25th of December then next, to wit, on, &c., delivered to the plaintiff, one R. H. W. Ingram, a conveyancing counsel, employed by and on behalf of the plaintiff, did thereupon object to the defendant's title, and required certain acts, matters, and things to be done, procured, and executed, for the completion thereof. That although notice in writing of the particular objections and matters so required was afterwards, and before the said 21st of February then next, to wit, on the 17th of February, 1829, given to the said Keen in the said articles of agreement in that behalf mentioned; and although the plaintiff was afterwards, to wit, on, &c., ready and willing, and often offered to pay the said sum

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of 20,000*l.*, the remainder of the said purchase-money, and to complete the purchase, on having a good title to the said estate to be sold free of tithes; and had always from the time of making the articles of agreement well and truly performed and fulfilled all things therein contained on his part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof; yet the defendant, not regarding the said articles of agreement, *did not nor would, on or before the said 25th of March in the year last aforesaid, or at any time afterwards, make or procure to be made a good title to the said estate free of tithes, but wholly refused and neglected so to do. By reason of which said several premises, the plaintiff not only lost and was deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the completion of the said purchase, but was put to great charges and expenses, amounting in the whole to a large sum of money, to wit, the sum of 1,000*l.*, in and about the negotiating and agreeing for the purchase of the said estate, and having the same surveyed; and about the investigating the title to the said estate, and the existence and effect of the said supposed *modus* in the said articles mentioned; and in and about his defence of and in a certain suit commenced and prosecuted by the defendant against the plaintiff in the Court of Chancery, for compelling a specific performance by plaintiff of the said articles of agreement, and in which suit the bill filed by the defendant against the plaintiff was dismissed by the same Court; and in and about the making and performing of divers journies, and otherwise respecting the said purchase: and also thereby the plaintiff lost and was deprived of a great part of the gains and profits which he might and would otherwise have made and acquired, from using and employing the said sum of 1,500*l.*, so paid by him as aforesaid, and other monies provided and kept by plaintiff for the completion of the said purchase; and suffered and sustained divers losses, to a large amount, to wit, to the amount of 200*l.*, on the resale of certain sheep, bricks, and hurdles, purchased by the plaintiff for the stocking of the said farms, lands, and hereditaments, and improving the same, with a view to the completion of the said purchase.

The defendant pleaded the general issue, and afterwards, *under an order of *Nisi Prius*, a verdict was entered for the plaintiff; but such verdict was to be subject to the opinion of the Court, after an award should have been made by an arbitrator, who was thereby empowered to ascertain and settle the amount which would be properly payable to the plaintiff on each and every of the following heads of claim stated in the declaration, in case the Court should be of opinion that the plaintiff was entitled to recover thereon respectively: that is to say, the plaintiff's charges and expenses,—first, in and about the negotiating and agreeing for the purchase of the estate agreed to be sold, and having the same surveyed: secondly, in and about investigating the title to the said estate, and the existence and effect of a supposed *modus* in lieu of tithes: thirdly, in and about the defence of the suit in Chancery mentioned in the declaration: fourthly, in and about the making and performing of divers journees, and otherwise respecting the purchase: fifthly, the plaintiff's loss in being deprived of the gains and profits he might have made from using the 1,500*l.* mentioned in the declaration. The claim in respect of loss on the resale of sheep, &c. was abandoned.

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The arbitrator found that 6*l.* 11*s.* 8*d.* would be properly payable by the defendant to the plaintiff for his expenses in negotiating and agreeing for the said purchase; the sum of 4*l.* 9*s.* 8*d.*, parcel thereof, being expenses incurred by the plaintiff with his own agent in and about the said negotiation, and prior to the execution of the articles of agreement. And that 10*l.* 10*s.* would be properly payable for the expense of having the estate surveyed.

As to the second head of claim, the arbitrator found that the sum of 128*l.* 10*s.* 10*d.* would be properly payable in respect thereof, which sum was composed of the following particulars: the sum of 87*l.* 1*s.* 10*d.* for the charges of the solicitor of the plaintiff in the investigation *of title, allowed on taxation; 7*l.* 12*s.* 6*d.*, the expenses and coach-hire of the said solicitor in a journey to and from Stafford relating to the same matter, and also allowed on taxation; 6*l.* 17*s.* 2*d.*, the fees paid in searching for judgments and other incumbrances, which searches were made

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on the 27th of February, 1829; 1*l.* 11*s.* 4*d.*, fees paid in other necessary searches; and 25*l.* 8*s.*, expended in fees to counsel. But of the said sum of 87*l.* 1*s.* 10*d.*, the arbitrator found that 6*l.* 17*s.* 2*d.* were for solicitor's charges in attending to make the searches first above-mentioned; and 16*l.* 9*s.* 4*d.* for solicitor's charges in preparing conveyances on the 27th of February, 1829; and of the said sum of 25*l.* 8*s.*, the sum of 10*l.* 10*s.* was for counsel's fees in settling the same conveyances: and he also found that of the said sum of 87*l.* 1*s.* 10*d.*, the further sum of 10*l.* 18*s.* was for charges incurred after the date of the filing of the bill by the defendant to compel the specific performance above mentioned.

As to the third head of claim, the arbitrator found that the said bill was dismissed with costs; that the plaintiff's costs in defending himself against the said bill were taxed as between party and party; and that the amount of such taxed costs had been duly paid to him; but that there remained the sum of 194*l.* 4*s.* 11*d.*, which had been paid by him to his solicitors for the extra charges as between solicitor and client in the course of such defence; and the arbitrator found that the said sum of 194*l.* 4*s.* 11*d.* would be reasonably payable to the plaintiff under the third head.

As to the fourth head of claim, the arbitrator found, that in the course of the negotiation for and about the purchase, and of the defence of the plaintiff in the said suit, it became reasonable and prudent for the plaintiff to take certain journies and to incur certain expenses, and that the sum of 45*l.* would be properly payable to the plaintiff in respect thereof.

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And as to the fifth head of claim, the arbitrator found that, upon the dismissal of the defendant's bill in equity, with costs, the deposit of 1,500*l.*, theretofore advanced by the plaintiff, was ordered to be returned; that the plaintiff thereupon applied to the court of equity for an order for the allowance of interest thereon; and that an order was made, and had been performed, for the payment of interest at the rate of 4 per cent., from the 7th of November, 1828, to the 23rd of June, 1832, when the said deposit was returned: and if the Court should be of opinion that the plaintiff was entitled to recover any further compensation

for the loss of the use of the said 1,500*l.* during the period last mentioned, the arbitrator found that the sum of 54*l.* 3*s.* 3*d.* would be properly payable to him in that behalf.

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The question for the opinion of the Court was, whether the plaintiff should retain the verdict; and if so, whether for the sum of 489*l.* 0*s.* 8*d.*; or for what other sum.

Thesiger, for the plaintiff, and *Talfourd*, Serjt. for the defendant, discussed and received the judgment of the Court upon each head of the charges separately.

Upon the first head, with respect to the 4*l.* 9*s.* 8*d.* incurred by the plaintiff with his agent prior to the execution of the articles of purchase, and 10*l.* 10*s.* for the survey of the estate,

TINDAL, Ch. J. said :

The expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit, at a time when it is uncertain whether there will be any contract or not.

The charge for a survey must also be disallowed. It would have been prudent in the purchaser to defer the survey till he knew whether or not a title could be made out.

Upon the second head, *Thesiger* abandoned the claim of 16*l.* 9*s.* 4*d.* for the charges of preparing a conveyance, and 10*l.* 10*s.* counsel's fees thereon: and *Talfourd* objected to the charge of 7*l.* 12*s.* 6*d.* for the journey to Stafford to investigate title, and 6*l.* 17*s.* 2*d.* for searching for judgments, on the ground that the investigation (which could only be the comparing of deeds with the abstract), and the search for judgments, was made too early in the proceedings. The plaintiff should not have incurred those expenses till he knew whether or not the defendant could answer the objections to his title.

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TINDAL, Ch. J. :

I think both these charges may be allowed. Unless judgments are searched for at an early stage of the proceedings, great expense may afterwards be incurred unnecessarily; and, for the

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same reason, the comparison of deeds with the abstract should be made early.

Upon the third head, *Talfourd* objected to the payment of 194*l.* 4*s.* 11*d.*, the plaintiff's costs as between attorney and client, *ultrà* the costs as between party and party, taxed and paid to him in the suit in Chancery. In *Hathaway v. Barrow* (1) it was held that in action for malfeasance, whereby the plaintiff incurred costs in judicial proceedings, if there was an order of another Court for the defendant to pay the costs of those proceedings to the plaintiff, he could neither recover, as special damage, the sum at which they were taxed, nor the extra costs as between himself and his attorney.

Sinclair v. Eldred (2), and *Jenkins v. Biddulph* (3), are to the same effect.

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Thesiger, in support of the claim, relied on *Sandback v. Thomas* (4), where, in an action for maliciously holding the plaintiff to bail, he was held entitled, in the calculation of damages, to recover, not merely the taxed costs, but the costs as between attorney and client.

And in *Jones v. Dyke* and others (5), an action for the recovery of deposit money and damages upon the refusal of a vendor to complete a sale of an estate in Wales, the plaintiff had a verdict by consent for the following charges, the Judge, M'DONALD, C. B., thinking them reasonable: "costs of plaintiff's solicitor, 47*l.* 19*s.* 4*d.*; journies to London and Llandilo, 21*l.*; journey to London, 15*l.* 15*s.*"

Sandback v. Thomas was not cited in *Jenkins v. Biddulph*: and in *Webber v. Nicholas* (6), BEST, Ch. J. thought *Sandback v. Thomas* right, although, as it was only a *Nisi Prius* decision, he could not adhere to it in opposition to decisions in banc.

There can be no reason, on principle, why a party should not be indemnified for all the lawful expenses he has incurred in a successful suit. In the present case, these extra charges are a

(1) 1 Camp. 151.

(2) 4 Taunt. 7.

(3) 4 Bing. 160.

(4) 18 R. R. 771 (1 Stark. 306).

(5) Sugd. Vend. & Pur. Append. 8.

(6) Ry. & M. 419.

damage to the plaintiff consequential on the defendant's breach of contract.

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(TINDAL, Ch. J.: If the court of equity had thought so, it would have ordered costs to be taxed as between attorney and client.

BOSANQUET, J.: Are not costs beyond taxed costs to be considered as incurred voluntarily, beyond what is absolutely necessary?)

The extra costs here may be considered as one branch of the expense of investigating title, which, it has been decided, the plaintiff has a right to recover.

TINDAL, Ch. J.:

We all think that the extra costs in Chancery are not a damage which is a necessary consequence *of the breach of this contract. Every expense which is a necessary consequence of the breach of contract, ought to be allowed; but the filing a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases. Upon this principle, and in adherence to the cases cited for the defendant, we think this claim ought not to be allowed.

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PARK, J.:

I am of the same opinion. If the claim be allowed in this case, I do not see why, in all cases, a separate action should not be brought for costs which the officer of the Court disallows on taxation.

VAUGHAN, J. concurred.

BOSANQUET, J.:

I think the plaintiff had his compensation in the costs allowed by the officer of the Court.

Upon the fourth head of charges, 45*l.*, for journies and expenses which it was reasonable and prudent for the plaintiff to take and incur in negotiating the purchase and defending the Chancery

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suit, it appeared that some of the journeys had been taken before the contract; the expense of them, therefore, was disallowed pursuant to the decision under the first head. So, likewise, as a result of the decision on the third head, was the expense of such of these journeys as were undertaken in the course of the Chancery suit.

The fifth head of charges was not contested, and

Per CURIAM:

It ought to be allowed.

Judgment accordingly.

1835.
Jan. 31.
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BOWER v. HILL AND ANOTHER (1).

(1 Bing. N. C. 549--556; S. C. 1 Scott, 526; 1 Hodges, 45; 4 L. J. (N. S.) C. P. 153.)

Defendants having erected, on their own premises, a permanent obstruction to a navigable drain leading from a river through defendants' premises to plaintiff's close: Held, that an action lay for the plaintiff, notwithstanding the portion of the drain which passed through the plaintiff's close had for sixteen years been completely choked up with mud.

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THE plaintiff declared, that before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, the plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of a certain close of land, with the appurtenances, situated in the county of Warwick; and by reason thereof, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from the said close of the plaintiff, unto and along a certain stream or watercourse in the county aforesaid, unto and into a certain public navigable river, called the river Nene, in the county aforesaid, and so back again from *the same river unto and along the said stream or watercourse, and from thence unto the said last-mentioned close of the plaintiff, for himself and his servants to go, return, pass, and repass in boats every year, and at all times of the year, at his and their free will and pleasure:

(1) See the principle of this decision applied in *Harrop v. Hirst* (1868) L. R. 4 Ex. 43, 38 L. J. Ex. 1; and in *Goodhart v. Hyett* (1884) 25 Ch. D. 182, 53 L. J. Ch. 219.—R. C.

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yet the defendants, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the plaintiff in that respect, and to deprive him of the use and benefit of his said way, whilst the plaintiff was so possessed of his close, with the appurtenances aforesaid, and so entitled to the said way, to wit, on the 1st of January, 1830, and on divers other days and times between that day and the day of the commencement of this suit, in the county aforesaid, wrongfully and injuriously obstructed the said way. By means whereof, the plaintiff could not, during the time aforesaid, nor can he have or enjoy his said way as he of right ought to have done; and whereby also the plaintiff hath been, and still is, hindered from having, enjoying, and occupying his said close in so full and beneficial a manner as he otherwise would, and of right ought to have done; to wit, at, &c.

At the trial before Taunton, J., last Northampton Assizes, it appeared that a drain or watercourse passed from the river Nene, through the defendants' closes up to a close of the plaintiff: that the drain was navigable from the river up to the defendants' closes, and had formerly been navigable up to the plaintiff's close; but for the last sixteen years, the accumulation of mud in the drain between the plaintiff's close and the defendants' had been so great, that no barge could pass along that part of it. Under these circumstances, the defendants had recently erected, on their own land, a bridge over the drain, and a tunnel across it, under the bridge, just below the accumulation of mud, in such a manner as to render any passage up to the mud impracticable.

In answer to a question proposed by the learned Judge, the jury found, "That before the erection of the bridge and tunnel by the defendants, the passage was obstructed, so that the plaintiff could not have the use of it:" and upon this finding, a verdict was directed to be taken for the defendants.

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Adams, Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* to set aside this verdict and enter, instead, a verdict for the plaintiff, or to have a new trial, on the ground that, upon the evidence in the cause, the plaintiff was entitled

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at least to nominal damages; his right to the watercourse and the value of his property being affected by the impossibility of retrieving the navigation to his premises if a permanent obstruction were allowed to exist. In order to sustain an action for the assertion of a right, it is not necessary that the party should have incurred pecuniary damage: *Marzetti v. Williams* (1).

Hill and Miller, who shewed cause, contended, that as the plaintiff, in consequence of the accumulation of mud upon his own premises and between them and the defendants', was never in a position to be obstructed by any act of the defendants' on the drain, he could not recover even nominal damages for that which was no injury, or if an injury, was occasioned in a great measure by his own neglect: Com. Dig. Action on the Case, B. 4: for a party who brings case must have justice on his side: *Bird v. Randall* (2). In like manner, a commoner cannot maintain an action where the lord of the manor is defendant, unless a specific injury has been sustained: 1 Wms. Saund. b, note 346. The plaintiff, here, unless he has incurred some damage, cannot sue the *defendants for an act done on their own soil; that act not being necessarily injurious to the plaintiff's reversion: *Baxter v. Taylor* (3). In *Williams v. Morland* (4), a plaintiff alleged in his declaration that he was possessed of a messuage and premises, and by reason thereof entitled to the use of a stream of water running through the premises, for supplying the same with water; that defendant erected a dam higher up the stream, and thereby prevented the water from running in its course, in its usual calm and smooth manner, whereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff: on issue joined on a plea of not guilty, the jury found that the plaintiff's banks and premises were not injured by the dam erected by the defendant, but added, that defendant had no right to stop the water in the summer-time: the Judge ordered the verdict to be entered for the defendant; and it was held, that the verdict was right; for

(1) 35 R. R. 329 (1 B. & Ad. 415).

(3) 38 R. R. 227 (4 B. & Ad. 72).

(2) 3 Burr. 1345.

(4) 26 R. R. 579 (2 B. & C. 910).

flowing water was *publici juris*, and an individual could only acquire a right to it by appropriating so much of it as he required for a beneficial purpose; and therefore the plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and to prove that he had sustained an injury from the want of a sufficient quantity of water.

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Adams and Humfrey, in support of the rule :

In *Williams v. Morland* nothing was done by the defendant that could affect the plaintiff's title : In the present case, if the plaintiff were to acquiesce in the obstruction erected between his own premises and the river, his title to navigate the watercourse could in a few years be lost. His right to a common benefit from the channel *cannot be disputed : *Mason v. Hill* (1). But a permanent obstruction tends to impair his title, and therefore is an injury for which he is entitled to damages.

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Cur. adr. vult.

TINDAL, Ch. J. :

This question comes before us on a motion for a rule to set aside a verdict entered for the defendants by the direction of the learned Judge; and the motion is made, on the ground that the finding of the jury, on certain points left to them, does not warrant such verdict; and, at all events, that, upon the evidence given in the cause, the verdict ought, properly, to have been found for the plaintiff.

The plaintiff declared in case; stating in his declaration, that he was possessed of a close, and entitled to a right of way from the said close along a certain drain or watercourse, unto and into a public navigable river called the Nene, and so back again, for himself and his servants to go, return, pass, and repass in boats, at his free will and pleasure; and the plaintiff then assigns as a grievance, that the defendants, knowing the premises, wrongfully and injuriously obstructed the said way, by means whereof the plaintiff could not enjoy it as he of right ought to do. At the trial, the jury, in answer to a question proposed to them by the learned Judge, found, "that the passage was

(1) 39 R. R. 354 (5 B. & Ad. 1).

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obstructed before the erection of the bridge and tunnel by the defendants" (which was the act complained of), "so that the plaintiff could not have the use of it;" and upon this finding of the jury, the learned Judge directed the verdict to be found for the defendants.

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It appeared, upon the evidence, that the plaintiff's close and premises were at the further end of the drain or watercourse; and that the defendants' premises, *upon which the obstruction was erected, were situated between the plaintiff's premises and the river Nene: and it further appeared, that the accumulation of mud in the drain between the plaintiff's close and the defendant's premises had been so great, and was so great at the time of the erection of the bridge and tunnel by the defendant, that for the last sixteen years, no barge could navigate or pass along that part of the drain or watercourse; and that the defendant had erected the bridge and tunnel across the drain at his own premises, just below the accumulation of mud, in such manner as to render any passage through the bridge and tunnel, even if the mud had been removed, altogether impracticable. And the question raised before us has been, whether, in this state of circumstances, there was such an obstruction of the right of passage along the watercourse, as can form the ground of an action against the defendants. But we think the right to the verdict, in this case, may be decided upon a narrower ground. The right of navigating through the drain or watercourse, from the plaintiff's close to the Nene and back again, is equally a right to navigate through the drain from the river Nene to the plaintiff's close and back. And upon the evidence in this case, if the plaintiff should endeavour to pass with a boat or barge from the river Nene to his premises, he would be prevented, by the defendants' erection, from even arriving so far up the drain as to reach the impediment created by the mud. The plaintiff, therefore, would, in the strictest construction of the words in the declaration, "be prevented, by the defendants' obstruction, from enjoying his way, as he of right ought to do;" for he could not get so near his premises, as, but for the erection of the tunnel, he might have done. And although this would, in fact, be but a very small prevention of the exercise of his right, yet it is the

*principle on which we are to decide, and not the particular state of facts which apply to the present case; for if the obstruction had been at the very mouth of a drain, and the accumulation of mud had commenced several miles up, and close to the plaintiff's close, the same argument would have applied; in which case, it is obvious that the damage to the plaintiff, by such an intervening obstruction, might have been very great. Upon this ground, therefore, we think the case must go down to another jury, unless it is consented that he should take a verdict with nominal damages only.

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But, independently of this narrower ground of decision, we think the erection of the tunnel is in the nature of, and, until removed, is to be considered as, a permanent obstruction to the plaintiff's right, and therefore an injury to the plaintiff, even though he receive no immediate damage thereby. The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises: *Jesser v. Gifford* (1). The plaintiff's premises would sell for less whilst the tunnel is in existence, if now put up to sale. And, indeed, there seems no legal ground upon which the facts relied on by the defendants can constitute an answer to the charge upon the record. As a plea of denial of the charge, they would not support it: for the tunnel was erected by the defendants, and the erection is such as effectually to prevent barges from passing through it, whether they can come up to it or not. Again, if put upon the record as a plea in bar, *they would amount to a confession of the charge without being an avoidance; for it is no excuse to the defendants, that the plaintiff has voluntarily suffered an accretion of the mud, which he might remove at any time when he thought fit. The voluntary suspension by the plaintiff of his exercise and enjoyment of a right, can form no justification to the defendants for preventing him from the possibility of enjoying it.

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(1) 4 Burr. 2141.

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Upon the more general ground, therefore, that the erection of the bridge and tunnel is an immediate injury to the plaintiff, by putting his right into hazard, and by preventing the actual enjoyment of it whenever he thinks fit to resume it, independently of the narrower ground on which we first relied, we think this action maintainable: and that the rule for a new trial must be made absolute.

Rule absolute.

[On a subsequent trial between the same parties, and, apparently, in respect of the same claim, it appeared that the former user of the way in question was referable to certain premises called the "King's Head Inn" and Yard, which were not in the occupation of the plaintiff; and it was held that this was evidence of a grant to the owner of the "King's Head Inn" and Yard, and not of any right in the plaintiff: *Bower v. Hill*, 2 Bing. N. C. 339.]

1835.
April 24.
[573]

WHITE v. PARKER (1).

(1 Bing. N. C. 573—584; S. C. 1 Scott, 542; 1 Hodges, 112; 4 L. J. (N. S.) C. P. 178.)

Devise of land to trustees, in trust to permit testator's wife and daughters to receive the clear rents of three parts to their sole and separate use, and the testator's son the clear rent of the fourth part; the trustees to pay all outgoings, to repair, and to let the premises: Held, that the legal estate, as to all the four parts, vested in the trustees.

Upon the death of one of two trustees, the survivor was to appoint another in place of the deceased, and to convey the premises to him, to hold them jointly with the survivor. One of the trustees being dead, the survivor, by a deed to which the cestui que trusts were parties, appointed P. sole trustee, in place of himself and the deceased, and conveyed the premises to P., to hold to him and his heirs, and not jointly with the surviving trustee: Held, that the whole legal estate passed by that conveyance to P.

[*574] In covenant by the assignee of a lessee for years against the assignee of the reversion, on a covenant to take trees and fixtures at a valuation at the end of the term, the defendant pleaded that the next and immediate *reversion in the demised premises did not vest in the defendant.

(1) See note to *Doe v. Biggs*, 11 R. R. 533.—R. C.

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At the trial before Tindal, Ch. J., the plaintiff, after proving a lease of the premises to the person who assigned to himself, by George Adams the elder, for twenty-five years from October, 1807, put in the will of the said George Adams, who died in 1809.

By that will, Adams devised all his land in the parish of Acton (including all the demised premises), and all other his real estate whatsoever, and all his estate and interest therein, with their appurtenances, to Joseph Ringham and Thomas Suter, their heirs and assigns, upon trust, as to one-fourth part of all his said devised real estate, to pay or to permit and suffer his wife Catherine Adams to have and receive the clear yearly rents and profits thereof, for and during the term of her natural life; with remainders over to his son George Adams, and his daughters Elizabeth, the wife of William Wright, and Mary Adams, and to the survivors of them, in fee. And as to one other fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his son George to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of his natural life; and from and after his decease, in trust as to the same fourth part, for the eldest or only son (as the case might be), of his son George, who should be living at his decease, his heirs and assigns: and if his son George should not leave a son surviving him, then in trust for such person or persons as at the decease of his son George should be his heir or heirs, and his, her, or their heirs and assigns. And as to one other fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his daughter Elizabeth Wright, wife of the said William Wright, to have and receive the clear yearly rents and profits thereof, for and during the term *of her natural life, with remainders over to her issue, or heirs. And as to the remaining fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his said daughter Mary to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of her natural life, with remainder over to her issue or heirs: the several parts and shares of his said wife and daughters, in the rents and profits of the said devised real estates to be for their respective sole and separate uses whilst

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under coverture, and to be paid into their own hands or to such person or persons as they respectively should from time to time, by writing under their hands, order direct, or appoint, and not to be subject to the control of any husband. He directed his trustees and the survivor of them, and the heirs and assigns of such survivor, from time to time, in their own judgment and discretion, to let and set his said devised real estates for such term or terms of years not exceeding seven years, and on such conditions as they should think fit, always reserving the best and most approved yearly rent or rents which under all circumstances could be reasonably had or gotten for the same. And further, during the continuance of the trust thereinbefore declared of and concerning his said devised real estates, out of the rents, issues, and profits thereof, to pay and discharge all outgoings, for taxes or otherwise, in respect to the premises, and to keep the premises in repair, and to retain payment for their expenses. And he directed that, upon the decease of his said trustees, or either of them, or of any other trustee to be appointed by virtue of that authority, or upon his or their refusing or becoming incapable to act in the trust, a new trustee or trustees should be appointed in his or their place and stead, by the surviving or continuing trustee, or the executors or administrators of the surviving trustee; and thereupon the trust *estate and premises should be conveyed to and vested in the surviving or continuing and the new appointed trustee or trustees jointly: and in case there should be no surviving or continuing trustee or trustees, then in such newly appointed trustee or trustees and their heirs, upon the several trusts thereinbefore declared, of and concerning the same, or such of them as should be then subsisting or capable of taking effect; and that every such new trustee should and might act therein as if he had been appointed by the testator.

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Ringham died in 1818; and, in November in the same year, Suter, the surviving trustee, by an indenture, to which all the cestui que trusts were parties, appointed the defendant to be sole trustee, in the place of himself and of the deceased trustee; and further executed a conveyance by lease and release for the expressed purpose of vesting the legal estate in the defendant.

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George Adams, the son, was of full age at the date of the will. At the time of commencing this action, all the cestui qui trusts named in the will were living, and the property had not been divided.

A verdict having been found for the plaintiff upon the issue affirming the next reversion to be in the defendant,

Taddy, Serjt. moved to set it aside, on the ground, first, that as to the fourth part appertaining to George Adams, the legal estate was in him, upon the true construction of his father's will; secondly, that at all events it was not in the defendant, the surviving trustee Suter not having conformed to the power in the will which authorised him to convey.

For the first point he relied on *Doe d. Leicester v. Biggs* (1), where it was held, that a devise to one in *trust to permit and suffer another to receive, gives the legal estate to the cestui que trust; and though he admitted that, with respect to the three shares allotted to the females of the testator's family, the legal estate might vest in the trustees in order to secure the property to the separate use of the females, *Jones v. Lord Say and Sele* (2), *Harton v. Harton* (3),—there was nothing to prevent George Adams from having the legal estate in his fourth part, pursuant to the decision in *Doe v. Biggs*: he might hold it as tenant in common with the trustees. And if the legal estate in any part of the premises were not in the trustees, the issue, which went to the whole, ought to be found for the defendant: *Hare v. Cater* (4).

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At all events, according to the power in the will, the surviving trustee could only convey to a new trustee, to hold jointly with himself: for it was evident, that the deviser intended there should never be fewer than two trustees. The conveyance to the defendant, therefore, not being in conformity with that power, no estate passed to him.

A rule *nisi* having been granted,

Smirke shewed cause:

With respect to the conveyance, it is immaterial to enquire

(1) 11 B. R. 533 (2 Taunt. 109). (3) 4 R. R. 537 (7 T. R. 653).

(2) 2 Vin. Abr. 262; Eq. Cas. Abr. (4) Cowp. 766.

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whether or not the defendant has been properly appointed a trustee, for the legal estate is in him at all events by the deed of lease and release. In *Doe d. Read v. Godwin* (1), the City Lottery Act, 46 Geo. III. c. 97, vested the prizes therein enumerated in five trustees by name, in trust for the purposes of the Act; and by the sixteenth section it was enacted, that “in case of the death of one or more of the trustees before the drawing of the lottery and the conveyance of the prizes to the fortunate holders of the *tickets, the survivors should, and they were thereby required, to fill up the vacancy or vacancies by the election of some other persons for the purposes of the Act.” Nevertheless, it was held, in an action of ejectment, that the conveyance of a prize to the lessor of the plaintiff by four only of the five trustees (one having died), was valid; although it was there contended, that the Act made it imperative to fill up the vacancy before any conveyance was made. *Doe v. Keir* (2) also shews that the legal estate passed, at all events, whether the power was or was not duly executed. Besides, the defendant and George Adams being both parties to the conveyance, are estopped to say that no interest passed.

Then, upon the construction of the will, the legal estate vested in the trustees, as well in respect of George Adams's share as of the three others. For the trustees are required to discharge outgoings for taxes and otherwise; to let and to keep the whole in repair, and to retain for their expenses: these things they could not do unless they had the legal estate. In *Doe v. Biggs* no such duties were assigned to the trustees; the decision turned entirely on the words by which the estate, whether legal or equitable, was created, and there appear to have been no other provisions in the will that could assist the Court in ascertaining the intention of the deviser. MANSFIELD, Ch. J. said, “This case might be argued and considered for ever without advancing it at all in law, reason, or precedent. But, as it happens, in this will the last words are, ‘permit and suffer,’ which give the cestui que trust a legal estate; and the general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and, consequently,

(1) 1 Dowl. & Ry. 259.

(2) 33 R. R. 378 (4 Man. & Ry. 101).

for want of a better reason, we are forced to say that we think this will gives the *legal estate to the party beneficially interested." (*Smirke* was here stopped by the COURT.)

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Taddy and *Erle*, in support of the rule :

The powers to let, to pay outgoings, and to repair, were necessary in respect of those portions of the property which were devised for the benefit of the females. But there is nothing inconsistent in confining the legal estate of the trustees to three fourths, and allowing it to vest in the male devisee as to the other fourth. It has always been a principle in construing wills, to give the beneficial proprietor, if possible, the legal estate ; and, though the testator might use the precaution of naming trustees to secure the property of his daughters, he could scarcely have intended to preclude his son, who was of age at the time the will was made, from having full dominion over the property devised to him.

At all events, the conveyance by *Suter* operates under the Statute of Uses, and therefore must be governed by the intention of the testator. Now it was clearly his intention to avoid the incident of a survivorship, and to give his daughters the security of two joint trustees. In *Doe v. Godwin*, the conveyance did not operate under the Statute of Uses. If this had been a conveyance under a power in a deed to convey to another jointly with the existing trustee, it had been clearly void ; and *Suter* had no power to convey except according to the testator's directions. It is true that here was a conveyance by lease and release, but as that appears by its recital to be in pursuance of the power contained in the will and for the purpose of giving effect to the appointment of the new trustee, if that appointment was defective, the conveyance also must be inoperative.

TINDAL, Ch. J. :

In this issue, in an action of covenant, the question arises, whether the immediate and *next reversion of the premises did or did not vest in the defendant. There are two grounds on which it is contended that the reversion in question did not vest in him :

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First, it is said, that under the will of George Adams the interest devised to the trustees was not a legal interest, but was executed, at least in part, in one of the cestui que trusts; secondly, that even if this be not so, the power to convey conferred on the surviving trustee has not been well pursued; and that, therefore, no legal estate has passed to the defendant.

With respect to the first point, it depends upon what shall appear to be the intention of the testator expressed upon the will; and we cannot give full effect to his intention, unless we say, the use is executed in the trustees. It is contended that if the legal estate, as to any part of the premises, be not in the trustees, that would be sufficient to warrant a verdict for the defendant; assuming that position to be correct, for the purpose of argument, and confining our attention to the portion devised to the testator's son George, the words are, after a devise of the whole to the trustees—"upon trust, as to one fourth part of the same, to pay to or permit and suffer my said son George to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of his natural life; and from and after his decease, in trust, as to the same fourth part for the eldest or only son (as the case may be), of my said son George, who shall be living at his decease, his heirs and assigns; and if my said son George shall not leave a son surviving him, then in trust for such person or persons as at the decease of my said son George shall be his heir or heirs, and his, her, or their heirs and assigns."

[*581] It is contended, that inasmuch as the testator uses the words, "shall pay to, or permit and suffer my said son to have and receive the rents," the case must be governed *by the decision in *Doe d. Leicester v. Biggs*, where upon a devise in trust to pay unto, or else to permit and suffer the testator's niece to receive the rents, it was held, that the legal estate was executed in the niece.

It is to be observed, that in that case the Court says, that if there be a repugnancy, the first words in a deed, and the last in a will, shall prevail; and that "for want of a better reason" they were forced to say, that that will gave the estate to the party beneficially interested. Here the words are not precisely the same; but "to permit and suffer my said son to receive the clear

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yearly rents;" the trustees were themselves to pay the outgoings: besides which, as to three parts, it was necessary the trustees should take the legal estate for the protection of *femes covert*: *Jones v. Lord Say and Sele*; and it would be a very anomalous construction of the will to say, that the use was executed in the *cestui que trust* as to one fourth part, and in the trustees as to the other three fourths. How could we reconcile such a construction with the power given to the trustees "to demise the said devised estates, reserving the best rent that can be had?" If George were in possession of a fourth, how could the trustees reserve the best rent for the whole of the devised premises? The testator goes on: "And further, during the continuance of the trust hereinbefore declared of and concerning my said devised real estate, out of the rents, issues, and profits thereof to pay and discharge all outgoings, for taxes or otherwise, in respect of the premises, and to keep the premises in repair." How could they effect this, if a fourth part were in the possession of another person?

Looking at the will, it is impossible to carry into effect the intention of the testator, without saying, that the trustees took the legal estate in the whole of the premises.

The case, therefore, comes within the rule laid down in 2 Wms. Saund. 11 (note): "So, where something *is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate."

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Now, when the testator directs the trustees to pay all outgoings, and gives his son George the fourth part of the clear rents, what is that but giving him a fourth part of the residue of the rents, after discharging all outgoings? I think, therefore, that the trustees took the legal estate in the whole.

But it is said, that the reversion does not vest in the defendant, because he takes by a conveyance under a power, and the power has not been duly pursued. Perhaps, upon the death of Ringham, another trustee should have been appointed. But when in

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the conveyance to Parker it is recited, that Suter had refused to act further in the trusts of the will of G. Adams, deceased, and with the privity and approbation of Catherine Adams, George Adams, party thereto, &c. he had agreed to appoint the said C. R. Parker, party thereto, to be a new trustee, in the place and stead of Joseph Ringham, deceased; and when it is witnessed, that, for the purpose of vesting the freehold messuages, lands, tenements, and hereditaments devised by the will of the said George Adams, deceased, in the said C. R. Parker, his heirs and assigns, upon the trusts therein contained concerning the same, the said Thomas Suter, by and with the privity, consent, and approbation of the said C. Adams, G. Adams, &c. and according to the estate and interest of him the said T. Suter in the premises, under and by virtue of the said recited will of the said G. Adams, deceased, had bargained, sold, and released the premises to the said C. R. Parker, how are we *to say in a court of law, that because Suter neglected his duty and failed to appoint another trustee, no interest passed to Parker by the deed which has been executed? Suter cannot say *nihil operatur*, and the cestui que trusts, being all parties, are equally estopped. I am satisfied that the conveyance was valid at law, and vested the reversionary interest in Parker.

PARK, J. :

The distinction we now take was taken by Sir JAMES MANSFIELD in *Doe v. Biggs*; and in *Shapland v. Smith* (1) it was laid down, that if trustees have duties to perform, which require the possession of the fee, the fee is vested in them. In *Doe v. Biggs* they had no such duties, so that that case does not control our present decision. *Kenrick v. Beauchlerk* (2) proceeded on the same principle, and the rule was there referred to in argument by Serjt. Williams.

The very point arises on the will now before us, and I see no reason for making any distinction between the four separate parts of the property. We have only to see whether the final words are applicable to the whole, for they are almost the same as

(1) 1 Br. C. C. 75.

(2) 6 R. R. 746 (3 Bos. & P. 175).

those used by Serjt. *Williams*—"to pay rates and taxes, and keep the premises in repair, or the like."

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GASELEE, J. :

This case differs from *Doe v. Biggs* in many particulars. First, the trustees are to apply the clear yearly rents to the use of the several cestui que trusts. What can that mean but the clear residue after defraying all outgoings? Secondly, the words relied on in *Doe v. Biggs* were the last words in the will; here they are followed by the clause which requires the trustees to pay the outgoings out of the whole receipts, and to keep the estate in repair. The effect of leaving the legal estate as to a fourth in the son would be to raise a squabble every *time repairs were to be done. Besides this, Parker, after accepting a conveyance from the trustee, is precluded from saying that he had no title to convey. Whether or not a court of equity would order another trustee to be appointed we need not say; but, sitting in a court of law, we are bound to say that the legal estate was in the defendant at the time of the action.

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BOSANQUET, J. :

The question is, did the legal estate in the whole vest in the trustees, or was it, as to a fourth, executed in George Adams? The terms of the disposition in favour of George Adams resemble those in *Doe v. Biggs*. The terms in that case were, a trust to permit and suffer the testator's niece to receive and take the rents, issues, and profits of the estate devised to the trustees: and if the disposition to George Adams had stopped at that point, it would have been difficult to distinguish the cases. But the CHIEF JUSTICE has pointed out the material difference occasioned by the use of the word "clear" in the present devise: that means, the clear residue after the deduction of all outgoings. According to Sir JAMES MANSFIELD, in *Doe v. Biggs*, if there be an ambiguity the last words must prevail; and in that case the directions to permit and suffer the cestui que trust to receive the rents were the last words of the devise; and those words, unrestrained, would give the legal estate to the cestui que trust. In the present will those words are followed by many

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other directions; and amongst others by directions to the trustees to defray charges and make repairs. How could they do that unless they had the legal estate? It seems to me, therefore, that they have in respect of George Adams's share the same estate which it is admitted they have in respect of the shares devised to the females.

Rule discharged.

1835.
May 4.
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POOLE v. DICAS.

(1 Bing. N. C. 649—655; S. C. 1 Scott, 600; 1 Hodges, 162; 4 L. J. (N. S.) C. P. 196; S. C., at Nisi Prius, 7 Car. & P. 79.)

An entry of the dishonour of a bill of exchange, made in the usual course of business, at the time of the dishonour, in the book of a notary, by his clerk, who presented the bill, may be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry.

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In an action on a bill of exchange drawn by the defendant, accepted by Wheeler, and indorsed by the defendant to the plaintiff, a notary's clerk stated at the trial, that when the bill became due on Saturday, the 8th of June, 1833, it was left by the plaintiff with the notary, to demand payment. A copy of the bill was made in a book kept by the notary for that purpose, and Manning, one of his clerks, now dead, went out about seven in the evening to demand payment of the *acceptor; in a short time Manning returned, and in the margin of the book containing the copy of the bill, wrote by the side of the copy of the bill, "no effects." This entry was produced at the trial, and proved to be in Manning's handwriting.

Another clerk made a similar entry, from Manning's dictation, in a separate book which contained the protest for non-payment. All this was done in the regular course of the notary's business. On the Monday following a letter was written to the plaintiff, in London, apprising him of the dishonour of the bill, of which the defendant, also resident in London, received notice on Tuesday by a letter put into the post on Monday.

It was objected that the entry made by Manning ought not to have been received in evidence, and that the notice ought to have been given to the defendant on the Monday. A verdict was taken

for the plaintiff with leave for the defendant to move to set it aside and enter a nonsuit on these grounds.

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Humfrey having obtained a rule nisi accordingly,

Bompas, Serjt. and *Hoggins*, who shewed cause, relied on *Doe d. Patteshall v. Turford* (1), where all the cases on the subject are cited, and where it was proved to be the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of service on the tenant; two of these notices were *proved to have been delivered by him on that occasion;—and it was held, on the trial of an ejectment, after the attorney's death, that the indorsement so made by him was admissible evidence to prove the service of the third notice.

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Kelly and *Humfrey*, *contra*, contended that an entry such as the present "is to be received in two cases only; first, where it is an admission against the interest of a deceased party who makes it; and, secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place:" which was the rule acceded to by PARKE, J. in *Doe v. Turford*. Here the entry of the dishonour of the bill was a single unconnected fact, the proof of which did not raise a presumption of any other fact, so that the entry rather resembled that which was made by a sheriff's officer in *Chambers v. Bernasconi* (2), where the Court of Exchequer intimated an opinion that a written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, and sent by him immediately to the sheriff's office, and there filed in the course of business, was not, after the death of the officer, evidence of

(1) 37 R. R. 581 (3 B. & Ad. 890).

(2) 1 Tyr. 335.

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v.
DIGGS.

the place of arrest in an action between a bankrupt and his assignees.

(TINDAL, Ch. J.: What was decided in that case in the court of error was, that it was no part of the officer's duty to indorse on the writ the place of arrest. The indorsement, therefore, was not entitled to credit as an entry made in the course of business.)

Here, the entry was not the best evidence; for the person who gave the answer at the place of presentment might have been called: nor was it clearly proved to have been made at the time of the transaction.

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Then, the letter announcing the dishonour of the bill ought to have been put in the post in time to reach the drawer on the day the bill was dishonoured. In *Smith v. Mullett* (1), where, in an action by the fourth against the first indorsee of a bill of exchange, all the parties to which resided in London, it appeared that the plaintiff received notice of the dishonour of the bill from his indorsee on the 20th of the month, and gave notice to his immediate indorser, by a letter put into the twopenny post-office on the evening of the 21st, but so late that it was not delivered out till the morning of the 22nd,—it was held, that by that *laches* the plaintiff discharged all the prior indorsers, although in the course of the 22nd notice of the dishonour was given both to the second indorsee and to the defendant.

TINDAL, Ch. J.:

Upon inspection of the bill, we are satisfied that no question can arise on the last point; for if the bill, after its dishonour on Saturday evening, were returned to the holder, in regular course, on Monday, notice could scarcely be given to the defendant till Tuesday.

As to the first point, which is of considerable importance, we think the evidence in question was admissible; and we think it admissible on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine

(1) 11 R. R. 694 (2 Camp. 208).

of business by a person who had no interest to misstate what had occurred. If there were any doubt whether it were made at the time of the transaction, the case ought to go down to trial again: but according to my impression of the testimony in the cause, the entry was made at the time: had any ambiguity existed on that head, a single question to the witness, on cross-examination, would have cleared it up. *I give my opinion, therefore, on the assumption that the entry was made at the time. And this does not carry the law farther than the principle established in *Doe d. Patteshall v. Turford*. There, it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service: on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of service on the tenant: two of them were proved to have been delivered by him on that occasion: and it was held, on the trial of an ejectment, after the attorney's death, that the indorsement so made by him was admissible evidence to prove the service of the third notice.

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In the present case it was the duty of the notary's clerk to present bills for payment on the evening of the day when payment was demandable. After going out with the bill for the purpose of presentment, he returns and makes an entry in the margin of the book in which a copy of the bill had been made upon its being left at the notary's for the purpose of presentment. This was all in the ordinary course of business. The clerk had no interest to make a false entry: if he had any interest, it was rather to make a true entry: it is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred; and a false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made, was open to all the clerks in the office, so that an entry if false would be exposed to speedy discovery. The entry being thus *primâ facie* consistent with truth, there are many accompanying circumstances which tend

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to confirm its correctness; and *the letter addressed to the holder on Monday to apprise him of the presentment and dishonour of the bill is a link in the chain which gives consistency to the whole. It has been argued that the decision in *Doe v. Turford*, can only be supported on the supposition that no other evidence could have been given but that which was received. But that is carrying the case farther than the facts warrant; for there might have been persons present when the notice was served. In the present case, it would operate as a great hardship to require the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application; and if it were necessary to call all the persons who resided at the place of presentment, the expense and inconvenience would be enormous.

The rejection of the evidence which has been received would be a great injury to the commercial classes, by casting an unnecessary difficulty on the holders of bills of exchange.

PARK, J. :

I am of the same opinion. We should occasion great alarm if we were to reverse all the decisions which have been referred to on this point. I go along with the observations of Mr. Justice JAMES PARKE, in *Doe v. Turford*, where he puts the reception of entries made in the usual course of business, on the ground that the party made the entry at the time. The book here has all the appearance of exactitude; and the whole proceeding was but one act. The clerk goes out; returns; and makes the entry at once: and PARKE, J. says—"It is to be observed, that in the case of an entry falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party and his death are enough to authorise its reception; at whatever time it was made it is admissible: but in the other case *it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." It would occasion an enormous expense to call all the persons who might have been at the place when the presentment was made. The decision in *Chambers v. Bernasconi* turned on the circumstance that the

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sheriff's officer was going beyond the sphere of his duty when he made an entry of the place of arrest, and that such an entry therefore had no claim to be received as evidence of that fact. If we were to accede to the argument for the defendant, we should overrule all the cases on the subject for the last fifty years.

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v.
DICKES.

GASELEE, J. :

I am of the same opinion. If only the entry made by Manning had been produced, it would have been more trustworthy evidence than the mere recollection of persons who might have been present; but the entry is one of a chain of circumstances each confirmatory of the other, and therefore the reception of the evidence was correct according to the principle laid down in *Doe v. Turford*.

Rule discharged.

BOSANQUET, J. was absent, in his capacity of Commissioner of the Great Seal.

ALEXANDER AND ANOTHER v. GARDNER AND
ANOTHER (1).

1835.
May 6.

(1 Bing. N. C. 671—680; S. C. 1 Scott, 630; 1 Hodges, 147; 3 Dowl. P. C. 146; 4 L. J. (N. S.) C. P. 223.)

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Plaintiffs in London, sold to defendants a quantity of butter, which they expected from Sligo; the quality and price were specified in the contract. The butter was to be shipped for London in October, and to be paid for by bill at two months from the date of landing. The butter was not shipped till November, but the defendants waived the objection, and accepted the invoice and bill of lading. The butter having been lost by shipwreck: Held, that plaintiffs might recover the price from defendants in an action for goods bargained and sold.

ASSUMPSIT for goods bargained and sold, under the following circumstances:

The plaintiffs, merchants in London, and agents for Irish houses in the sale of butter, being in expectation of a cargo from Murphy of Sligo, entered, by means of their broker, into the following contract with the defendants:

“LONDON, October 11, 1833.

“Sold to Messrs. William Gardner & Son for account of Messrs. Alexander & Co., 200 firkins Murphy & Co.'s Sligo

(1) See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, Rule 5.—R. C.

ALEXANDER butter, at 71s. 6d. per cwt. free on board for first quality;
v. 4s., and 6s. difference for inferiors. Payment, bill at two
GARDNER. months from the date of landing. To be shipped this month.
An average for weights and tares within six days of landing,
if required."

On the 11th of November the plaintiffs received from Murphy the invoice and bill of lading of these butters, and also the intelligence that, owing to there having been no ship in the port of Sligo bound for London, the butter had not been shipped till the 6th of November.

This circumstance was immediately communicated to the defendants, who at first refused to abide by the contract, on the ground that the butters were to have been shipped in October. In a little time, however, they abandoned their objection, and consented to retain the invoice and bill of lading which had been delivered to them on the 12th of November.

[*672] The invoice, which described the butters in detail as *to weight, number of casks, &c., was addressed to the plaintiffs; but upon handing it over, their name had been struck out, and the name of the defendants substituted, as is usual in the trade.

The bill of lading described the casks by their marks and several quantities, and directed them to be delivered to the plaintiffs.

In December, 1833, the greatest part of the butters was lost by shipwreck on the coast of Galway, and a small part of them arrived in a damaged state: whereupon the defendants, not having effected any insurance, refused to pay.

At the trial before Tindal, Ch. J., it was contended on their part that, under the circumstances above stated, the action for goods bargained and sold did not lie; and that the plaintiffs, in order to recover, should have declared specially on the contract of the 11th of October, alleging and proving that the goods had been shipped in October, and duly landed; since, according to the contract, payment was not to be made till two months after landing.

The jury found that the condition for shipping in October

had been waived by the defendants, and returned a verdict for 414l., the contract price of the butters.

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GARDNER.

Talfourd, Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* for setting aside this verdict and entering a nonsuit on the ground above stated. He relied mainly on *Simmons v. Swift* (1), where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him: it was held, that the property in the residue did not vest in the purchaser *until it had been weighed, that being necessary in order to ascertain the amount to be paid: and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. From that case it followed that an action for goods bargained and sold will not lie, unless the property in the goods passes to the purchaser at the time of the bargain. But so far was the property here from passing to the defendants at the time of the bargain, that at that time the goods were not in the plaintiffs' hands, or, for aught that appeared, in existence. And the principle established by *Goss v. Lord Nugent* (2), that when the time for delivery is fixed by a written contract, it cannot be extended by oral agreement, afforded a strong argument to shew that the plaintiffs should have set out in their declaration the special circumstances of their demand.

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Bompas, Serjt. and *Martin* shewed cause:

The action for goods bargained and sold will lie; for the property in the butters passed to the defendants by the contract. It was not necessary to that end, that they should have been in the actual possession of the plaintiffs. The invoice and bill of lading were symbols of possession, and by the transfer of those symbols the property passed to the defendants: *Lickbarrow v. Mason* (3), *Haille v. Smith* (4), *Cuming v. Brown* (5), *Barrow*

(1) 29 R. R. 438 (5 B. & C. 857).

(4) 1 Bos. & P. 563.

(2) 39 R. R. 392 (5 B. & Ad. 58).

(5) 9 R. R. 603 (9 East, 506).

(3) 1 R. R. 425 (2 T. R. 63).

ALEXANDER v. *Coles* (1). The plaintiffs had no longer an insurable interest:
 v. *Hibbert v. Carter* (2). In *Simmons v. Swift* the bargain was
 GARDNER. held incomplete, because something remained to be done on
 the part of the vendor, namely, the weighing a part of the
 bark; but here, at the time of the contract the quantity, quality,
 [*674] weight, and price of the butters, were all ascertained by *the
 contract itself. *Rohde v. Thwaites* (3), *Atkinson v. Bell* (4), and
Elliott v. Pybus (5), are strong authorities for the plaintiffs.
 The condition for shipping in October was expressly waived by
 the defendants; there was no agreement for extending the time;
 and therefore, *Goss v. Lord Nugent* has no application. Even
 if the contract here were conditional, the condition having been
 waived, it was not necessary to declare specially. 2 Wms.
 Saund. 269 b, note. As to the objection that the goods were
 to be paid for in two months after landing, that was a stipulation
 ascertaining only the time of payment, and not rendering the
 landing a condition precedent. In *Fragano v. Long* (6), where
 the vendee, resident at Naples, sent an order to the vendors at
 Birmingham, "to despatch to him certain goods, on insurance
 being effected; terms, three months' credit from the time of
 arrival;" the vendors (having marked the package with the
 vendee's initials), despatched the goods by the canal to
 Liverpool, and effected an insurance declaring the interest to
 be in the vendee. At Liverpool the goods were delivered by
 the agent of the vendors to the owner of a vessel bound to
 Naples, through whose negligence they were damaged: it was
 held, that the property of the goods vested in the vendee as
 soon as they were despatched from Birmingham; that the
 terms of the order did not make the arrival of the goods at
 Naples a condition precedent to his liability to pay for them;
 and that he might therefore maintain an action for the injury
 done to the goods through the negligence of the ship owner.

Talfourd and Kelly in support of the rule:

Looking to this transaction, it was not a contract for the

(1) 13 R. R. 763 (3 Camp. 92).

(4) 32 R. R. 382 (8 B. & C. 277).

(2) 1 R. R. 388 (1 T. R. 745).

(5) 38 R. R. 532 (10 Bing. 512).

(3) 30 R. R. 363 (6 B. & C. 388).

(6) 28 R. R. 226 (4 B. & C. 219).

bargain and sale of goods at the time of the contract, *and did not become so by any subsequent circumstances. For,

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First, the plaintiffs did not make out their case by shewing simply, the indorsement of the bill of lading: they were obliged to connect it with, and to produce the special contract:

Secondly, the goods were not in their possession even when the bill of lading was transferred: and,

Lastly, the landing of the goods was a condition precedent to their being paid for; and as the contract was in writing, the condition for shipping in October could not be waived orally.

In none of the cases cited were there any special provisions in the contract, with reference to which the rights of the parties were to be decided; and in all of them the goods sold were in the possession of the vendors: but here the plaintiffs, not being in possession of the goods, were not in a situation to carry the contract absolutely into effect.

If *Fragano v. Long* had been an action for goods bargained and sold, it would have afforded an answer to the objection made in this case, that the landing of the goods was a condition precedent to the property vesting in the defendants: but it was an action by the purchaser of goods against a ship owner for negligence in conveying them; and the purchaser having actually insured the goods, was the party at whose risk they were carried. Here the defendants had not insured, and for the reasons before urged, were not the responsible proprietors.

TINDAL, Ch. J.:

The question in this cause is, whether an action for goods bargained and sold is maintainable against the defendants. They contend, that such an action does not lie against them; but, that under the circumstances of the case, the plaintiffs should have declared specially.

The original contract was made on the 11th of *October, 1833, in which contract it is stated, that the plaintiffs sold to the defendants 200 firkins of Sligo butter, free on board, at 71s. 6d. per cwt.: that the goods were to be shipped in the course of that month, and that payment was to be by a bill of exchange, payable two months after the landing of the goods.

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Upon this contract three objections have been raised to the action for goods bargained and sold.

First, that the butters were not in the possession of the plaintiffs at the time of the contract.

Secondly, that they were not shipped in October as the contract required; and,

Thirdly, that as the payment was to be at two months after the landing of the goods, and as the goods were never landed, such payment could not be required.

Notwithstanding these objections, I think the contract was to pay for goods bargained and sold, and that the declaration to that effect is in the proper form. And I agree that the plaintiffs must shew that the property in the goods passed to the defendants by the contract; for, unless it did, the goods were not bargained and sold to them.

But as to the first objection, if the goods were ascertained and accepted before the action was brought, it is no objection that they were not in the possession of the plaintiffs at the time of the contract. In *Rohde v. Thwaites* (1), the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads: four hogsheads were delivered; the vendor filled up, and appropriated to the vendee sixteen other hogsheads; informed him that they were ready, and desired him to take them away; the vendee said he would take them as soon as he could: and it was held, that the appropriation having been made by the vendor and assented to by the vendee, the sixteen hogsheads thereby *passed to the latter; and that their value might be recovered by the vendor under a count for goods bargained and sold.

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Here, it is impossible to say the goods were not ascertained and accepted before the action was brought; for the quantity, quality, and price, were all specified in the invoice; and the bill of lading was regularly indorsed to and accepted by the defendants.

But then it is said, that the shipping of the goods in October was a condition precedent to any claim on the defendants. If the defendants had in the first instance repudiated the bargain

on that ground, it is true no action would have lain against them. But it is found by the jury that they waived the objection; and this being only a parol contract, if the party waives the condition he is in the same situation as if it had never existed.

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The third objection to the plaintiffs' recovery is, that the butters were to be paid for by a bill at two months after landing. But the object of that stipulation was, merely to fix the time of payment, and not to make the landing a condition precedent. For that point it is enough to refer to the decision in *Fragano v. Long*.

The present case, therefore, is brought within the result of all the decisions, as stated by Serjt. *Williams*, in the note 2 Wms. Saund. 269 b.

Here, the action was not brought till long after the two months which would have succeeded the landing of the goods, if they had arrived in the ordinary course. The plaintiffs, therefore, being in the situation of one who has parted with his goods, and the defendants of one who has received them upon an engagement to pay, the action will lie, and this rule must be discharged.

PARK, J. :

I entirely concur. The condition for shipping the goods in October having been waived, the question is, whether an action lies for goods bargained *and sold; and that turns on the question, whether or not there has been an acceptance of the goods by the defendants. I think there has, and that an action might have been maintained even for goods sold and delivered; but it is sufficient to say, that the right to sue for goods bargained and sold is complete. The defendants' argument turns on the principle, that goods sold remain at the risk of the vendor, till every thing is done to complete the contract: *Hinde v. Whitehouse* (1); or till a specific appropriation has taken place. But that having been effected here by the transfer of the bill of lading, the case falls within the principle of *Rohde v. Thuwaites*, and *Fragano v. Long*. We have been pressed with

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(1) 8 R. R. 676 (7 East, 558).

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the authority of *Simmons v. Swift*. There, the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified; and a part was afterwards weighed and delivered to him: it was held that the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that, even if it had been vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. In that I entirely concur. But see what the case was in *Rohde v. Thwaites*. There the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads: four hogsheads were delivered to the vendee; the vendor filled up and appropriated to the vendee sixteen other hogsheads, informed him that they were ready, and desired him to take them away. The vendee said he would take them as soon as he could. It was held, that the appropriation having been made and assented to, the property in the sixteen hogsheads passed to the vendee, and that *their value might be recovered by the vendor under a count for goods bargained and sold. And the argument that the arrival and landing of the goods was to be a condition precedent to payment, is answered by *Fragano v. Long*. There the vendee, resident at Naples, sent an order to the vendors, hardwaremen at Birmingham, "to despatch to him certain goods, on insurance being effected; terms, three months' credit from the time of arrival." The vendors despatched the goods by the canal to Liverpool, and effected an insurance, declaring the interest to be in the vendee: at Liverpool the goods were delivered by the agent of the vendors to the owner of a vessel bound to Naples, through whose negligence they were much damaged: it was held, that the property in the goods vested in the vendee as soon as they were despatched from Birmingham; that the terms of the order did not make the arrival of the goods at Naples a condition precedent to a liability to pay for them; and that the vendee might therefore maintain an action for the injury done to the goods through the negligence of the ship owner.

That case, therefore, and the case of *Rohde v. Thuaites* entirely warrant our present decision.

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GASELEE, J. :

The CHIEF JUSTICE and my brother PARK having gone so fully into the case, I shall only observe that here the invoice specifies the weight and price of all the goods.

BOSANQUET, J. :

I think that this was a contract executed, and that therefore the plaintiff has properly declared for goods bargained and sold. It is not necessary for the support of such an action that the goods should be actually in the possession of the vendor. Here he was entitled to the possession, and has done all that was required on his part to render the transfer *effectual. It is said he should have declared specially, shewing the performance of the condition precedent as to the time of shipping, or a waiver of it in writing. If the contract containing the condition had been by deed, that doctrine might have applied, but this was a parol contract, and the condition might be waived without a writing. A contract must be declared on according to its legal effect; and the effect of all the circumstances here is, to render it a contract without a condition. The objection that the arrival of the goods was a condition precedent to payment is answered by the case of *Fragano v. Long*, where it was decided that the property in the goods vested in the vendee as soon as they were despatched from Birmingham; that the terms of the order did not make the arrival of the goods at Naples a condition precedent to the vendee's liability to pay for them; and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship owner. Here, the time for arrival of the goods having long since elapsed, the time for payment must also be arrived if there was to be any payment at all, and that there was to be a payment is decided by *Fragano v. Long*.

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Rule discharged.

1835.
May 13.

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GIBSON AND ANOTHER, ASSIGNEES OF DAVID RANKINE,
A BANKRUPT, v. BELL (1).

(1 Bing. N. C. 743—756; S. C. 1 Scott, 712; 1 Hodges, 136.)

Held, that a defendant might set off a debt due to him from a bankrupt for money lent, &c. against a claim by the bankrupt's assignees on defendant for not accepting, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to the defendant.

THE declaration stated that David Rankine, before he became bankrupt, and before the making of the promise of the defendant therein-after next mentioned, had sold to the defendant, and the defendant had then purchased of the said D. Rankine divers, to wit, 5 butts, 7 hogsheads and 2 quarter casks of wine, and 166 dozen bottles of wine of great value, at and for certain prices or sums of money, amounting in the whole to a large sum of money, to wit, 535*l.* 10*s.*; that the defendant had in part payment, and on account thereof, accepted three several bills of exchange, respectively bearing date the 31st of October, 1833, drawn by the said D. Rankine upon the defendant; to wit, a certain bill of exchange for the payment of the sum of 165*l.* 3*s.* six months after the date thereof; a certain other bill of exchange for the payment of the sum of 165*l.* 3*s.* nine months after the date thereof; and a certain other bill of exchange for the payment of the sum of 165*l.* 4*s.* twelve months after the date thereof: that it was agreed by and between the defendant and the said D. Rankine, that the defendant should deliver to the said D. Rankine in further payment and on account of the said sum of 535*l.* 10*s.*, a pipe of port wine valued at 50*l.* more or less, and that any difference there might then be between the sum to which the said three several bills of exchange so drawn upon and accepted by the defendant, and the price of the said pipe of port wine so to be delivered by him to the said D. Rankine as aforesaid should amount, and the said sum of 535*l.* 10*s.* *so to be paid by the defendant to the said D. Rankine for the said first mentioned wines as aforesaid, should become and be the subject

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(1) Cited and followed, under the Bankruptcy Act of 1869 (32 & 33 Vict. c. 71, s. 39), in *Peat v. Jones* (1881) 8 Q. B. Div. 147, 51 L. J. Q. B. 128.—R. C.

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of future arrangement between the defendant and the said D. Rankine: of all which premises the defendant had notice; and thereupon, before the said D. Rankine became bankrupt, and also before the said bill of exchange therein-before firstly mentioned became due and payable according to the tenor and effect thereof, to wit, on the 25th of November in the year aforesaid, in consideration that the said D. Rankine, at the request of the defendant, would cancel and destroy the said last-mentioned bill of exchange for 165*l.* 4*s.*, and would not require the defendant to deliver the said pipe of port wine according to the said agreement in that behalf, the defendant promised the said D. Rankine before he became bankrupt, to accept divers, to wit, three other bills of exchange to be respectively drawn by the said D. Rankine upon the defendant, to wit, a bill of exchange to bear date the 15th of November in the year aforesaid, for the payment of the sum of 45*l.* three months after the date thereof; another bill of exchange to bear date the 25th of November in the year aforesaid, for the payment of the sum of 50*l.* three months after the date thereof; and a third bill of exchange for the payment of the sum of 110*l.* 3*s.*, to be drawn at such time and to bear such date as to allow the defendant ten months for the payment of the said sum of 110*l.* 3*s.*, being the balance then due and owing from the defendant to the said D. Rankine upon the account aforesaid; and to deliver the said last mentioned three bills of exchange to the said D. Rankine so accepted as aforesaid, when the defendant should be thereunto afterwards requested. The plaintiffs then averred that the said D. Rankine, confiding in the said promise of the defendant, did afterwards, and before he became bankrupt, *and also before the said bill of exchange thereinbefore firstly mentioned became due and payable according to the tenor and effect thereof, to wit, on, &c., cancel and destroy the last mentioned bill of exchange for 165*l.* 4*s.*; of which the defendant then had notice: and although the defendant, in part performance of his said promise, did afterwards and before the said D. Rankine became bankrupt, to wit, on, &c., accept the said several bills of exchange for the payment of the said several sums of 45*l.* and 50*l.*, and deliver the same so accepted to the said D. Rankine; and although the said

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D. Rankine did afterwards, to wit, on, &c., draw upon and deliver to the defendant a certain other bill of exchange at such time and bearing such date as would allow the defendant ten months for the payment of the said balance, to wit, bearing date the 2nd of January, 1834, for the payment of the said sum of 110*l.* 8*s.*, eight months after the date thereof, and did then request the defendant to accept the said last mentioned bill of exchange, and to deliver the same so accepted to him the said D. Rankine ; and although the plaintiffs, as assignees as aforesaid, afterwards and after the said D. Rankine became a bankrupt, to wit, on the 31st of January in the year aforesaid, and afterwards, did also request the defendant to accept the said last mentioned bill of exchange, and to deliver the same so accepted to them the plaintiffs as assignees as aforesaid ; and although the said D. Rankine before he became bankrupt, and the plaintiffs, as assignees as aforesaid, since the said D. Rankine became bankrupt, had not nor had any or either of them at any time required the defendant to deliver the said pipe of port wine to the said D. Rankine, or to the plaintiffs as assignees as aforesaid, or to any or either of them ; yet the defendant, not regarding his said promise, but contriving and wrongfully intending to deceive and defraud the said D. Rankine before he became bankrupt, and the plaintiffs as assignees *as aforesaid, since the bankruptcy of the said D. Rankine in that behalf, did not nor would when he was so requested as aforesaid, or at any time before or afterwards accept the said last mentioned bill of exchange, or deliver the same so accepted to the said D. Rankine before he became bankrupt, or to the plaintiffs, as assignees as aforesaid, or either of them, since the bankruptcy of the said D. Rankine.

There was also a count for goods sold and delivered ; for money lent ; for money paid to the use of defendant ; for money had and received ; and for money found to be due on an account stated.

The defendant pleaded, first, that he did not promise in manner and form as the plaintiffs had above complained against him, &c. ; and for a further plea as to the first count of the declaration, that before and at the time of the date and issuing

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forth of the fiat in bankruptcy under and by virtue of which the said David Rankine was found and adjudged to be such bankrupt as aforesaid, to wit, on the 13th of January, 1834, the said David was indebted to the defendant in 300*l.* for money by the defendant before then lent and advanced to and paid, laid out, and expended for the said David at his request, and for money by the said David before then had and received to and for the use of the defendant; that the said sum of money still remained unpaid and unsatisfied to the defendant; and that the defendant had not, when he gave credit to the said David in respect of the said sum of money or any part thereof, notice of any act of bankruptcy by the said David committed; which said sum of money so due, unpaid, and unsatisfied to the defendant as aforesaid, exceeded any demand of the said David before his said bankruptcy, and of the plaintiffs as assignees as aforesaid, since the said bankruptcy in respect of the matters in the first count alleged; of all which premises the plaintiffs *had notice before and at the time of the commencement of this action; and out of and against which said sum so due, unpaid, and unsatisfied to the defendant as aforesaid, the defendant was ready and willing, and thereby offered to allow and set off the full amount of such demand; and that, the defendant was ready to verify, &c. And for a further plea to the said declaration, except so far as related to the said first count, the defendant said that before and at the time of the date and issuing forth of the fiat in bankruptcy under and by virtue of which the said David Rankine was found and adjudged to be such bankrupt as aforesaid, to wit, on, &c., the said David was indebted to the defendant in 300*l.* for money by the defendant before then lent and advanced to and paid, laid out, and expended for the said David at his request, and for money by the said David before then had and received for the use of the defendant; that the said sum of money still remained wholly unpaid and unsatisfied to the defendant; and that the defendant had not when he gave credit to the said David in respect of the said sum of money, or any part thereof, notice of any act of bankruptcy by the said David committed; which said sum of money so due, unpaid, and unsatisfied to the defendant as in this plea aforesaid,

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exceeded the amount of the monies wherein the defendant was indebted to the said David as in the declaration in that behalf mentioned, or any demand of the said David before his bankruptcy, and of the plaintiffs as assignees since the bankruptcy in respect of those monies; of all which premises the plaintiffs had notice before and at the time of the commencement of this action, and out of and against which said sums of money so due, unpaid, and unsatisfied to the defendant as aforesaid, the defendant was ready and willing, and thereby offered to allow and set off the full amount of the said monies wherein the defendant was *indebted to the said David, and of any such demand as aforesaid in respect thereof; and that, the defendant was ready to verify &c.

In the replication, the plaintiffs joined issue on the first plea, and demurred to the second for the following causes: That the debt in that plea mentioned as due to the defendant, and the cause of action in the first count of the declaration mentioned, were not mutual debts or mutual credits capable of being set off against each other; that the cause of action in that count was not one to which a set-off could be pleaded; and also that the second plea was pleaded to the first count only of the declaration, whereas if the cause of action in that count was one to which a set-off could be pleaded, then as the causes of action in the residue of the declaration were also of a kind to which a set-off might be pleaded, a plea of set-off to the first count severally, accompanied by another plea of set-off to the residue of the declaration severally, was manifestly insufficient, because it amounted to no more than that D. Rankine was indebted to the defendant to an amount equal or greater than a part of the amount which the plaintiffs as assignees were entitled to claim of the defendant: That the said second plea tended to an immaterial and frivolous issue, and was in that respect informal and insufficient. As to the third plea, the plaintiffs replied that the said David was not before or at the time of the date or issuing forth of the said fiat in bankruptcy, indebted to the defendant in manner and form as the defendant had above in that behalf alleged; and that, the plaintiffs prayed might be enquired of by the country, &c.

Stephen, Serjt. in support of the demurrer :

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First, the defendant cannot plead two set-offs to different parts of the action ; the statute Geo. II. gives the set-off as an answer to the whole action, and if it were not *pleaded to the whole the plaintiff might be tricked. Suppose 100*l.* to be due to the plaintiff on one count, and another 100*l.* on a second, and suppose the plaintiff to owe the defendant 150*l.* ; if the defendant might plead a set-off of 150*l.* to the first count, and the same to the second count, he would answer a demand for 200*l.*, with a claim of no more than 150*l.*

Secondly, that which the plaintiffs claim is neither a mutual debt nor a mutual credit, and, therefore, cannot be open to a set-off. It is not a debt, since the bill, for refusing to accept which the defendant is now sued, would not have been due till September, 1834 ; this action was commenced in July, 1834, and there could be no debt till the bill was due : *Mussen v. Price* (1), *Dutton v. Solomonson* (2), *Brook v. White* (3), *Hutchinson v. Reid* (4), *Hoskins v. Duperoy* (5). It is, therefore, only a claim for damages incurred by the refusal to accept the bill. And such a claim is not a mutual credit ; for though in *Smith v. Hodson* (6) it was held that the payment by the defendant of an acceptance lent by the bankrupt was a mutual credit, yet *Rose v. Hart* (7) puts the limits to the rule, and shews that nothing is a mutual credit which will not terminate in a debt. In *Glennie v. Edmunds* (8) it was held that a loss on a policy could not be set off against the premium, on the ground that the action sounded in damages. In *Sampson v. Burton* (9) it was held that a guaranty against contingent damages could not form the subject of a mutual credit under the 5 Geo. III. c. 30, s. 28 ; and in *Rose v. Sims* (10) damages arising from a refusal to indorse a bill were held not to constitute a mutual credit.

Henderson, *contra* :

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To raise the first objection, the plaintiff ought to have

(1) 4 East, 147.

(2) 7 R. R. 883 (3 Bos. & P. 582).

(3) 1 Bos. & P. (N. R.) 330.

(4) 3 Camp. 329.

(5) 9 East, 498.

(6) 4 T. R. 211.

(7) 20 R. R. 533 (8 Taunt. 499).

(8) 4 Taunt. 775.

(9) 2 Brod. & B. 89.

(10) 1 B. & Ad. 526.

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demurred to both the pleas of set-off: but having taken issue on the second of them, he is precluded from saying that the second set-off exists. As to the first, this demand is at all events a mutual credit under the Bankrupt Act, because it arises out of a sale, and would certainly terminate in a debt. That distinguishes it from *Rose v. Sims*, where the claim arose, not from an act of buying and selling, but from a collateral liability the extent of which remained to be found by a jury.

But it may even be called a debt within the statutes of set-off, for the bill which the defendant declined to accept was to be given for a sum due on a balance of account. The question must be determined by the substance of the transaction, and not by the accident that the plaintiff sues in the form prescribed for unliquidated damages. In substance this is a debt. *Sampson v. Burton* was a case of damages arising out of a guaranty; in *Glennie v. Edmunds* the amount due was not ascertained at the time of the bankruptcy; in *Hoskins v. Duperoy* the question was as to the sufficiency of a petitioning creditor's debt; and a demand which would not constitute a good petitioning creditor's debt, may nevertheless be enforced in the way of set-off. But in *Utterson v. Vernon* (1) it was held that when a creditor has a demand on his debtor which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved as a debt under the commission. If so, there can be no objection to allowing a set-off in respect of a similar demand.

Stephen, in reply, relied chiefly on *Rose v. Sims*.

Cur. adv. vult.

[751] TINDAL, Ch. J.:

In this case, the plaintiffs have taken two objections to the special plea of the defendant, pleaded by him to the first count of the declaration: one, a formal objection assigned for cause of special demurrer, the other an objection in point of law.

As to the formal objection, we think the plaintiffs cannot avail themselves thereof in the present state of the record.

(1) 1 R. R. 767 (3 T. R. 539).

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The plaintiffs have demurred specially to the first plea of set-off, pleaded to the first count, and have traversed the second plea of set-off, pleaded to the second count. As against the plaintiffs therefore, who have denied the facts stated in the second plea to be true, it may be taken that the facts alleged in it are not in existence; that is, as if there were no set-off in point of fact against the second count of the declaration. The plea of set-off to the first count may therefore be considered as if it stood alone; and in that case, there could be no objection to a defendant pleading a set-off to one count only of a declaration. Even if the plaintiff had traversed each plea separately, and gone to trial upon separate issues on those pleas, we cannot see that the difficulty urged by the plaintiffs could ever have taken place. For after the defendant had given evidence of the items of his set-off against the first count, he would not be allowed to give evidence of the same items a second time, as an answer to the demand in the second count. Unless therefore the whole set-off was large enough to cover the demands in both counts, the plaintiffs must have recovered either on the one count or the other. And we think further, that if the objection intended to be taken was the joining on the record two separate pleas of set-off, one to each of the counts of the declaration, the demurrer should have extended to both pleas, and the misjoinder have been then alleged as the ground of demurrer; for the putting of the one plea *upon the record is as much to be objected to as the placing of the other there.

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With respect to the objection in matter of substance to the first plea of set-off, the question is, whether the cause of action stated in the first count of the declaration, and the debts alleged in the plea to have been due from the bankrupt to the defendant, before and at the time of his bankruptcy, can be considered "as mutual credits between those parties," so that "the one debt or demand" may be set off against the other within the meaning of the statute 6 Geo. IV. c. 16, s. 50 (1).

Looking to the form of the first count of the declaration, it is a claim for unliquidated damages against the defendant, for not accepting a bill of exchange according to a special agreement

(1) See now the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38.—R. C.

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entered into between the defendant and the bankrupt. But that agreement appears on the face of the first count to have been in substance a contract to accept a bill in payment of the remainder of the price of certain goods, sold and delivered by the bankrupt to the defendant: and the bill of exchange is expressly alleged in that count to have been drawn "for the balance then due and owing from the defendant to the said bankrupt upon the account aforesaid." In substance therefore, the bill, if accepted, would have been a security for the payment at a future day of a settled and ascertained balance due upon an account, in which the price of goods sold to the defendant formed one side, and partial payment made by the defendant the other side. It is to be observed further, that the plaintiffs, although they have brought a special action of assumpsit, have stated no special damage in their declaration; so that the measure of damage to which the jury would be confined in their verdict, is necessarily a mere matter of calculation, viz., the amount for which the bill was drawn, together with the interest *due upon it, if the time of payment was passed; or the amount of the bill, *minus* the discount, if the bill was not then due. And the question is, whether this is such a credit given by the bankrupt to the defendant as comes within the meaning of the clause above referred to.

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The principle which the bankrupt laws seem to have had in view from the earliest time to the last provisions made therein, is this, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. That this was the practice of the commissioners of bankrupt long before any statutory provision on the subject, appears clear from the two earliest decided cases: *Anonymous* (1) before Lord Chief Justice North, and *Chapman v. Derby* (2).

The first statute which made any express provision on the subject, was the expired statute 4 & 5 Anne, c. 17. By that statute it was enacted in the eleventh section, that where there hath been mutual credit given between the bankrupt and any debtor, and the accounts are open and unbalanced, it shall be

(1) 1 Mod. 215.

(2) 2 Vern. 117 (1689).

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lawful for the commissioners or assignees to adjust the account, and the debtor shall not be compelled to pay more than shall appear to be due on such balance. This provision of the expired statute of Anne, is re-enacted in the twenty-eighth section of the 5 Geo. II. c. 30, with some variation in the expression, that section enacting that "the commissioners or assignees shall state the account between them, and one debt may be set against another, and what shall happen to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively." This statute continued in force *until the 46 Geo. III. c. 135, s. 3, which provides, that where there hath been mutual credit given, or mutual debts between the bankrupt and any other person, "one debt or demand may be set against the other, notwithstanding any secret act of bankruptcy before committed." The same language is continued in the last statute 6 Geo. IV.; so that from the earliest practice to the latest provision by statute, the object seems to have been, that the account should be stated as between merchant and merchant, and that whatever would be in ordinary practice a pecuniary item in such account, should be the subject of set-off; and we think the demand of the bankrupt against the defendant under the circumstances stated upon this record, falls clearly within this description.

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The cases upon which the plaintiffs have principally relied in argument are two: the case of *Rose v. Hart* (1) and *Rose v. Sims* (2). In the former, Lord Chief Justice GIBBS, in giving the judgment of the Court, has laid down the rule of interpretation, that by credit, the Legislature meant "such credits only as must in their nature terminate in debts;" a distinction that is adopted by the Court of King's Bench in the latter case of *Rose v. Sims*.

Now it is observable that in giving judgment in the former case, the CHIEF JUSTICE states the law of set-off to depend upon the enactment in the 5 Geo. II. c. 30, s. 28, and lays great stress upon the circumstance, that it is enacted merely in the final

(1) 20 R. R. 533 (8 Taunt. 499).

(2) 1 B. & Ad. 526.

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words of the clause "that one debt shall be set against another." But, in point of fact, the law of set-off at that time was governed, not by the 5 Geo. II. only, but also by the 46 Geo. III. c. 135, s. 3, by which latter statute it was enacted, as before observed, "that one debt or demand" may be set off *against another; and it is difficult to see for what purpose such latter word can have been introduced, and have been since continued in the fiftieth section of the last Bankrupt Act, except for the purpose of giving a greater latitude than the strict meaning of the word "debt" would of itself import. Without, however, relying on the inference from the introduction of the word "demand," and taking the explanation of the word "credit" with the restriction adopted by the Courts of C. P. and B. R., we think the claim of the bankrupt in this case is one which would in its nature terminate in debt and nothing else. If the demand had not been enforced until after the time for which the bill was to run, the demand became actually a debt for which the bankrupt might have brought his action for goods sold, or on an account stated. If enforced before the time had expired, his demand was one which must become a debt in a short time, and of which the present value was determinable by deducting the discount for the time the bill had still to run; and as to the case of *Rose v. Sims*, we think the present case may well be distinguished from it. In that case a special action was brought for not indorsing a bill of exchange according to an agreement; if the indorsement had been made, it would not in its nature necessarily have terminated in a debt from the defendants, for the acceptor would have been the debtor, the indorser a guarantee only.

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Upon the whole, the demand appears to us to be a mere pecuniary demand, which the commissioners or assignees might have stated in account between the defendant and the bankrupt; a demand which, although unliquidated at the moment, was capable of being reduced to certainty by a simple calculation, where no special damage had been incurred. This determination agrees with the principle adopted by the *Judges of this Court in the case of *Sampson v. Burton* (1), and is not in conflict with

the two cases on which the plaintiffs have principally relied; and certainly is more consistent with the principle and spirit of the bankrupt laws.

For these reasons, we think there ought to be

Judgment for the defendant.

RAND v. VAUGHAN AND ANOTHER (1).

(1 Bing. N. C. 767—770; S. C. 1 Scott, 670; 1 Hodges, 173; 4 L. J. (N. S.) C. P. 239.)

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A landlord cannot distrain under 11 Geo. II. c. 19, s. 1, goods fraudulently and clandestinely removed from the tenant's premises before the rent becomes due.

THIS was an action of trespass against the defendants, in bar of which, they both pleaded a joint plea of not guilty; and the defendant Duffield then pleaded specially, as bailiff of Vaughan the landlord, a justification for a distress under the 11 Geo. II. c. 19, s. 1: the plea stating that the rent for which the distress was *made, became due on the 25th of March, 1834; that the goods of the plaintiff were fraudulently and clandestinely conveyed away to prevent the distress; and that the distress was taken within thirty days next ensuing such carrying away of the goods.

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The plaintiff, in his replication, alleged that the goods were conveyed away on the 24th of March, 1834, before the time when the rent became due and payable; and the defendant Duffield, in his rejoinder, took issue on that allegation.

The jury found a verdict for the defendant Vaughan, on the plea of not guilty; and for the plaintiff, upon both the pleas of the defendant Duffield, with 10*l.* damages.

Platt moved to enter judgment for the defendant Duffield, *non obstante veredicto*, on the ground that, admitting the fact alleged in the replication, enough remained uncontroverted on the plea, to bar the plaintiff's recovery. If tenants could elude a distress by removing their goods the day before rent became due, the statutes of 8 Ann. c. 18, s. 2, and 11 Geo. II., which enabled

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landlords to seize, for rent in arrear, goods clandestinely removed, would have been passed in vain: and though EYRE, Ch. J. in *Watson v. Main* (1), thought those statutes did not apply to the case of a removal before the rent became due, Lord ELLENBOROUGH, in *Furneaux v. Fotherby* (2), doubted the correctness of that opinion. A rule *nisi* having been granted,

Henderson shewed cause:

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Although judgment is sometimes entered for a plaintiff *non obstante veredicto*, where a verdict has passed in favour of a defendant, there is no instance of an application like the present, where the verdict has been found for the plaintiff upon an issue *taken by the defendant. But the statutes of 8 Ann. and 11 Geo. II. apply only to the case of a removal of goods after rent is in arrear; and the decision of EYRE, Ch. J. has never been overruled.

Platt was heard in support of the rule.

Cur. adv. vult.

TINDAL, Ch. J. (after stating the pleadings and finding of the jury, as *ante*, p. 671) said:

This case comes before us on a motion to enter a verdict for the defendant Duffield, *non obstante veredicto*. The motion would perhaps have been more correct in point of form, if it had been a motion to arrest the judgment for the plaintiff, on the ground that enough still remains upon the defendant's special plea confessed by the plaintiff's replication, to bar the plaintiff's demand: for we are not aware that any instance can be produced where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favour, *non obstante*. But we think there is no ground whatever for the motion in the one form or the other. The short question raised by the pleadings is, whether the statute applies to cases where the tenant removes his goods fraudulently and clandestinely before the rent becomes due; and we are of opinion that such case is not provided for by the statute. By the common law, the distress for rent was necessarily

(1) 6 R. R. 806 (3 Esp. 15).

(2) 4 Camp. 136.

made upon some part of the demised premises, otherwise the tenant might rescue the distress, or bring an action of trespass. And it was only in case the landlord coming to distrain saw the cattle on the premises, and the tenant to prevent the distress drove them off the premises, that the landlord could justify freshly following and distraining them. And the statutes 8 Ann. c. 14, s. 2, and 11 Geo. II. appear to have been passed with the view of *removing such difficulty in the way of the landlord's remedy in the case of a fraudulent or clandestine removal of the tenant's goods off the premises. For it expressly empowers the landlord "to take and seize such goods, wherever the same shall be found, as a distress for the said arrear of rent; and the same to sell and otherwise dispose of in such manner as if the said goods had been actually distrained by such landlord in and upon such premises for such arrears of rent." It is the *place*, therefore, not the *time* of the distress, to which the statute intends to apply the remedy: and, indeed, it is obvious, that if the construction contended for by the defendant is adopted, as the landlord may, after five days next after the distress, sell the goods and pay himself the rent, he might do so in many cases before the rent became due, which never could have been intended. Looking to the intention of the Act therefore, and the great uncertainty which would arise if a removal of the goods at any time before the rent became due would be sufficient to let in the provisions of the Act; for if at any time, how long before, would be the question; we think the present distress was illegal. We therefore think the law to have been correctly laid down by EYRE, Ch. J., in *Watson v. Main* (1), upon which Lord ELLENBOROUGH appeared to have doubted only, but to have expressed no opinion, in 3 Camp. 136.

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Rule discharged.

(1) 6 R. R. 806 (3 Esp. 15).

IN THE COURT OF EXCHEQUER.

1835.

HARLEY AND ANOTHER *v.* KING.*Exch. of
Pleas.*(2 Cr. M. & R. 18—23; S. C. 1 Gale, 100; 5 Tyr. 692; 4 L. J. (N. S.)
Ex. 144.)

[18]

The assignee of a lease is liable for the breach of a covenant running with the land, incurred in his own time, though the action is not commenced until after he has assigned the premises.

COVENANT by the plaintiffs as assignees of the reversion, against the defendant as assignee of the lessee. The declaration, after stating the making of the lease, and the title of the plaintiffs, and the conveyance to the defendant, assigned, by way of breach, the non-performance of a covenant in the lease to repair, alleging it to be “after the assignment to the defendant, and during the continuance of the demise, and whilst he was possessed of the demised premises with the appurtenances.” Plea, that after the defendant became the assignee of the demised premises as in the declaration mentioned, and before the commencement of the suit, to wit, on the 28th day of August, in the year 1834, he the defendant, by a certain indenture of assignment then made and duly signed by him the defendant, and sealed with his seal, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto one William Plunkett, his executors, administrators, and assigns, all and singular the premises in the declaration mentioned, together with the said indenture of lease and the several assignments thereof, and the full benefit and advantage thereof, respectively, to have and to hold the said premises unto the said William Plunkett, his executors, administrators, and assigns, from the date thereof, for all the residue then to come and unexpired of the said term of years demised by the said indenture of lease, subject, nevertheless, to the payment of the yearly rent thereby reserved, and to the performance of the covenants therein contained, and which on the lessee’s or assignee’s part were to be observed and performed: by virtue of which said indenture of assignment the said William Plunkett, afterwards, to wit, on the day and year last aforesaid, entered into the said demised *premises, with the

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appurtenances, and became, and was thereof possessed, for the residue of the said term then to come and unexpired, whereof the plaintiffs, on the day and year last aforesaid, had notice; (concluding with a verification). Replication—That the said breach of covenant alleged and complained of in the said declaration was committed by the defendant after the said assignment to him in the said declaration, and whilst he continued such assignee, and before the making or signing of the said supposed indenture of assignment in the said plea mentioned; (concluding to the country). Demurrer—That the replication is not sufficient in law, because it does not traverse any matter alleged in the plea or put in issue thereby, or confess and avoid the allegation therein, or admit or deny that the said assignment in the said plea mentioned was before the commencement of the suit or otherwise, and leaves the traversable fact tendered by the plea wholly unanswered, &c., &c. Joinder.

Petersdorff, in support of the demurrer :

The question in this case is, whether the assignee of a lease containing a covenant to repair is liable, after an assignment by him, for a breach incurred before such assignment; and it is submitted that he is not liable. The liability of an assignee depends upon the privity of estate between him and the assignor, and with the ceasing of that privity the liability also ceases. One of the earliest and principal cases on this subject is that of *Pitcher v. Tovey* (1), which was an action of covenant against an assignee for rent due after the assignment. The Court there said, that covenant *would lie against the defendant “for rent due in his own time, but not after.” This expression, it must be observed, is ambiguous, and may signify either that the action is not maintainable for rent not due in his own time, or that it is not maintainable if brought after his own time. There appears to be no other authority at common law with regard to the liability of an assignee after assignment for a cause of action accruing before assignment. There are, however, several cases in equity from which it may be collected that the liability of the assignee at law ceases with the assignment over. The first of

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(1) 1 Salk. 81; Holt, 73; 4 Mod. 71; 12 Mod. 23; 1 Show. 340.

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those cases is that of *Treackle v. Coke* (1). There, an assignee of a lease, rendering rent, having enjoyed the land for six years, assigned over. The bill was to account for the time he had enjoyed. The defendant pleaded a judgment upon a demurrer at law, but the plea was overruled; for though in strictness of law there was no privity of contract (2) to charge the assignee, yet in equity he must certainly be chargeable for such time as he received the profits. From this decision, therefore, it appears that the plaintiffs had failed in an attempt to establish the liability of the assignee at common law. Upon the authority of this case, that of *Philpot v. Hoare* (3) was decided. There it was assumed, by the counsel in argument, that an assignee, after assignment, was discharged at law from arrears of rent accruing in his own time; and Lord HARDWICKE says, “as to arrears of rent” (those accruing in the assignee’s time), “I am clear of opinion, that the plaintiff has a remedy for them in this Court,” implying, that at law the remedy was lost.

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(PARKE, B. : *Philpot v. Hoare* is no authority to shew that in a case like the present it was *necessary to resort to the assistance of a court of equity. There the assignee having paid the rent incurred in her own time, assigned the premises on the 25th March, 1739, and the rent in question became due after the assignment, viz. at Lady Day, 1740; so that the question there was, whether or not the assignment was fraudulent.)

In a subsequent case, Lord HARDWICKE again uses expressions shewing that his opinion was, that the lessor in these cases had lost his remedy at law. In *Valliant v. Dodemeed* (4), he says, “as he (the assignee) has made an assignment to Lomax, Valliant has no remedy for these arrears at law, and is under a necessity for coming into this Court for its assistance.”

(PARKE, B. : In that case also the lessor sought to render the assignee liable for rent accruing after the assignment. It seems in these cases to have been doubted whether the assignee is liable

(1) 1 Vern. 165; 1 Eq. Ca. Abr. 47. *Corrie*, 2 Madd. 330, 341.

(2) *Quære estate*. The word “estate” is used by the VICE-CHANCELLOR (3) Amb. 480; 2 Atk. 219.

(4) 2 Atk. 546.

in referring to this case, in *Onslow v.*

at law for a breach in his own time ; but it is quite clear that he is so liable. Are there no stronger authorities than these ?)

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There is a judgment of Sir T. PLUMER's to the same effect as those already cited, in which he says, " equity gives relief to a landlord for his rent in cases of assignment ; first, where the assignment is merely colourable and fictitious, the possession remaining with the assignor ; or secondly, where, though there be a real assignment, yet it has been made for the purpose of depriving the landlord of his legal remedies for rent due after breaches of covenant incurred previous to the assignment " : *Ouslow v. Corrie* (1). In this case the VICE-CHANCELLOR cites a decision of Lord Chancellor Cowper to the same effect : " In a manuscript note of a case in Michaelmas Term, 12 Geo. II., furnished me by Mr. Maddock, *Mr. Fazakerley* cited a case which was before Lord Chancellor Cowper, in which it was agreed that, when a lease is assigned to one, and he assigns to a third person, that though the lessor has strictly no remedy *against the first assignee, the privity of estate being determined, yet if it appear that the second assignment was made in order to exonerate and discharge the assignor of rent due to the lessor, this Court will look upon it as a fraud, and oblige such assignor to pay the rent accrued in his own time, notwithstanding the privity of estate being determined, and there being no covenant from such second assignor."

[*22]

LORD ABINGER, C. B. :

This is an action brought by a lessor against an assignee of the lease, upon a covenant running with the land, for a cause of action accruing in the time of the assignee, and before the assignment made by him. The defence is, that the assignment by the defendant took place before the action was brought, and that, in order to render an assignee liable, it must appear not only that he is sued upon a cause of action arising in his own time, but likewise that the suit was commenced before the assignment, for that by such assignment the privity of estate upon which only the lessor can proceed, is determined. By the neglect of the assignee to repair, a breach was incurred in his own time, and a right of

(1) 2 Madd. 330, 341.

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action thereupon vested in the plaintiffs. What is there, then, to divest that right of action, and to deprive the party of his remedy, his right to which was complete before the assignment? The argument for the defendant would establish the position that all assignees, by a secret assignment to an insolvent, may divest themselves of all liability for any breach of covenant which they may have incurred. The principle of law is, that so long as the privity of estate continues, the assignee is liable upon all covenants running with the land. If, upon the breach of any such covenant, the lessor may sue him during the continuance of the assignment, what is there to prevent him from bringing his action after the assignment? There may be cases of specific breaches of covenant, where to *hold the contrary would be to commit great injustice. A covenant may exist with regard to maintaining machinery or other valuable property, the omission to perform which by the successive tenants of the premises nothing could repair. If the assignee can free himself by assignment from the liability to make good his own default, is his assignee to be charged with the whole amount, or to whom is the lessor to resort? It can never be contended, that, by an assignment to a beggar, an assignee shall be allowed to free himself from his vested liabilities.

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The rest of the Court (PARKE, B., BOLLAND, B., and ALDERSON, B.) concurred.

Judgment for the plaintiff.

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Pleas.*

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THOMAS v. THOMAS AND ANOTHER.

(2 Cr. M. & R. 34—41; S. C. 1 Gale, 61; 5 Tyr. 804; 4 L. J. (N. S.) Ex. 179.)

A unity of possession of the land *a quā* and of the land *in quā* an easement exists, does not extinguish but only suspends the easement, where the party is seised in fee of the one parcel, and possessed for the residue of a term of the other.

Where a party has a right to have the droppings of rain fall from his wall upon the premises of another, the right is not destroyed by his raising the height of the wall (1).

CASE. The declaration stated that the plaintiff, before and at the time of the committing of the grievances, &c., was, and from

(1) See the case referred to on this L. R. 8 C. P. 162, 163; 42 L. J. point in *Harvey v. Walters* (1873). C. P. 105, 107.—R. C.

thence had been, and still was, lawfully possessed of a certain messuage or dwelling-house, yard, and premises, with the appurtenances, situate and being in the county of Devon, to wit, in the borough and town of Crediton, in the said county, and of a certain thatched wall standing and being in and upon those premises; and by reason of such possession, during all that time, she, the plaintiff, for the necessary use and enjoyment of her said premises, ought to have had, and still of right ought to *have, the use and benefit of a certain channel, drain, gutter, or sewer, leading and running, by and from the said messuage or dwelling-house, over, across, along, and through the said yard of the plaintiff unto and into certain premises in the possession or occupation of the defendants there, near to the said premises of the plaintiff, by, through, and along which the said drain, &c. (stating the particular easement). And also, by reason of such possession as aforesaid, she, the plaintiff, was, during all the time aforesaid, entitled to the benefit, easement, privilege, and advantage of having and permitting the eaves and thatch of her said wall to extend and project a convenient space beyond and from the said wall over and upon the said premises so as aforesaid in the possession or occupation of the defendants, for the convenience and use of conveying and carrying off from her said wall and thatch thereof the rain which from time to time descended and fell thereupon. Yet the defendants, well knowing all the premises, but contriving, &c., whilst the plaintiff was so possessed &c. as aforesaid, to wit, on &c., wrongfully and injuriously shut, closed, stopped up, and obstructed the said drain, channel, gutter, or sewer, to wit, by and by means of divers large quantities of brick, &c., and the same so shut, closed, stopped up, and obstructed as aforesaid, kept and continued for a long space of time, to wit, from &c. And thereby and from no other cause whatsoever, during all the time aforesaid, divers large quantities of the refuse and foul water, and other filth, arising and proceeding from the said messuage and premises of the plaintiff, have been and still were prevented and hindered from running, flowing, and passing off in their usual course, through and out of the said channel, drain, gutter, or sewer, in the manner aforesaid; and by reason thereof, not only

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divers noisome, noxious, offensive, and unwholesome smells, &c., during all the time aforesaid, have ascended, &c. into the said messuage, dwelling-house, and premises of the plaintiff, but also *thereby the said premises, &c. of the plaintiff became and were greatly overflowed and wholly untenable, and the plaintiff and her family thereby had been and were greatly annoyed, &c. in the occupation, possession, and enjoyment thereof. And the defendants furthermore, on the same day and year aforesaid, and on divers other days and times, &c. wrongfully, injuriously, without the leave, and against the will of the plaintiff, erected, put, and placed, close to the said wall of the plaintiff, divers large quantities of brick, mortar, stone, wood, and other materials, and divers erections and buildings; and the same respectively there kept and continued for a long space of time, to wit, &c., so near to the said wall and to the thatch thereof, that by reason thereof, and from no other cause whatever, the rain, which from time to time descended to and fell upon the thatch of the said wall, was wholly prevented from dripping and falling from the thatch thereof in manner aforesaid, as the same ought to have done; and in consequence thereof great quantities, to wit, ten perches of the said thatch, and of the covering and coping of the said wall, had respectively become and been greatly rotten, decayed, damaged, injured, and destroyed; and by reason thereof, not only the plaintiff, during all the time aforesaid, lost the use and advantage of the said wall, but also by means of the said thatch covering and coping of the said wall having been so damaged and destroyed as aforesaid, large quantities of rain and moisture having from time to time, during all the time aforesaid, fallen upon and penetrated into the said wall of the plaintiff, and the same has thereby been greatly injured and damnified, and has been rendered ruinous, insecure, and dilapidated; so that, by means of the several premises aforesaid, the plaintiff hath been, during all the time aforesaid, greatly inconvenienced, &c. Pleas. First, Not guilty. Secondly, As to the part of the said declaration which relates to the said channel, drain, gutter, or sewer in the said declaration *mentioned, the defendants say that the plaintiff ought not to have or maintain, &c., because, they say, that the surplus or foul water, or other filth, which

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from time to time arose, were collected and proceeded from the said messuage or premises of the plaintiff, were not, during all the time aforesaid, used and accustomed, nor of right ought to enter, flow, pass, and be carried away from and off the said premises of the plaintiff into the said premises of the defendants, in manner and form as the plaintiff hath in her said declaration in that behalf alleged; and of this the defendants put themselves upon the country. Thirdly, And as to that part of the said declaration which relates to the eaves and thatch of the said wall in the said declaration mentioned, the defendants say that the plaintiff ought not to have or maintain, &c., because they say that the plaintiff was not, during all the time aforesaid, entitled to the benefit, easement, privilege, and advantage of having and permitting the eaves and thatch of the said wall to extend and project a convenient space beyond and from the said wall over and upon the said premises so as aforesaid in the possession or occupation of the defendants, for the convenience and use of conveying and carrying off and from her said wall and the thatch thereof the rain which from time to time descended and fell thereupon, and of this the defendants also put themselves upon the country. Upon these pleas, issue was joined.

At the trial before Patteson, J., at the last Assizes for the county of Devon, the following appeared to be the facts of the case: Joseph Thomas, the father of the defendants, being seised in fee of the land and premises occupied by the defendants at the time of the alleged injury, purchased the adjoining premises occupied by the plaintiff at the time of the alleged injury, in which there was a term of 500 years. By his will, dated the 18th April, 1816, the former property was devised to his wife *for life, with remainder in fee to his son John Vicary Thomas, one of the defendants; and the latter property was bequeathed for the residue of the term of 500 years to his wife for life, and afterwards to his son William, the husband of the plaintiff. Joseph Thomas died on the 28th May, 1820, having made Abraham Wreyford the trustee under his will, in whom the legal estate in all the property vested.

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The defendants for some time after the death of their father, occupied the premises in question as tenants from year to year;

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but, on the 10th of April, 1834, a lease of those premises was granted by Mrs. Thomas, the mother of the defendants, and by Wreyford, to the defendant John Vicary Thomas for sixty years, in case Mrs. Thomas should so long live. Both the defendants continued to carry on their business upon the premises. The plaintiff was in the actual possession of the other premises held for the residue of the term of 500 years, having been put into possession by Wreyford in the month of May, 1834. It appeared, that at one period of time after the death of Joseph Thomas the testator, and before the lease to the defendant John Vicary Thomas, Wreyford the trustee was in possession of both the premises.

The situation of the respective premises with regard to the drain did not become material, the defendants admitting the obstruction, and contesting the plaintiff's right to the easement. With regard to the claim of easement for the eaves-dropping, it appeared, that, about thirteen years since, the top of the plaintiff's wall was covered with pantiles, which projected several inches; but that upon the buildings being accidentally burnt, the wall was thatched, and the thatch projected some inches further than the pantiles had done. On this occasion, also, the wall was raised about three feet. The obstruction of the eaves-dropping was caused by the defendants building a wall close up to the wall of the plaintiff, within the space over which the pantiles had formerly projected, and within the projection of the thatch.

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The existence of the easements in question for the period of upwards of twenty years was proved, and the obstruction of the plaintiff in the user of them was admitted; but, it was insisted for the defendants, that the right to the easements was determined by the unity of possession of the premises in Wreyford the trustee. It was likewise insisted with regard to the eaves-dropping, that by the alteration made by the plaintiff in the height of the wall and the substitution of the thatched for the tiled roof, the right to that easement had ceased. The jury having found a verdict for the plaintiff with 40s. damages, the learned Judge gave the defendants leave to move upon the first objection to enter a nonsuit.

Erle now moved accordingly, or for a new trial :

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First, with regard to the easement of eaves-dropping. Where a party claims an easement, he cannot vary his mode of exercising his right; if he does so, that right ceases. The exercise of an easement is an infringement upon the right of another, and must be strictly pursued. Thus, a person who has a right of way for a particular purpose, cannot use it for another purpose; as where he possesses a right to carry corn or manure, that will not justify him in carrying lime, or the produce of a quarry: *Jackson v. Stacey* (1). Here, if the plaintiff had a right to raise the wall three feet, she had a right to raise it to any indefinite height; and if she could extend the projection of the roof four inches, why might she not extend it further, whatever inconvenience it might prove to be to the defendants? The alteration in the enjoyment of the right destroyed it, and the defendants were justified in building up their wall, as they would have been in case no easement whatever had existed.

(ALDERSON, B.: How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim? It has been *held in the case of lights, that where a party enlarges an ancient window, the owner of the adjoining land cannot obstruct any part of the light which ought to pass through the space occupied by the ancient window (2). If the act of the defendants is injurious to the plaintiff's original right, it is not the less so, because it is injurious also to a further right which the plaintiff claims.)

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If the wall is altered in height or extent, the right claimed ceases to be what it was.

(ALDERSON, B.: The only difference is, that since the alteration the drops have to fall from a greater height. How can that be in any degree prejudicial to the defendants?)

(1) 17 R. R. 663 (Holt, N. P. 455). 756 (3 Camp. 80); *Martin v. Goble*,
See *Saunders v. Newman*, 19 R. R. 312 1 Camp. 320; *Luttrell's case*, 4
(1 B. & Ald. 258). Co. Rep. 87 a.

(2) *Chandler v. Thompson*, 13 R. R.

THOMAS
F.
THOMAS. Secondly, the easements were extinguished by the unity of possession in Wreyford, the trustee. It is a rule of law, that whenever the land upon which an easement is claimed and the land in respect of which it is claimed are united in one person, the easement must cease; for no one can claim a right as against himself. Here, then, as soon as the possession of the whole premises was vested in Wreyford, the easements ceased to exist; and the plaintiff and the defendants took their respective premises in the same manner as Wreyford held them, viz. discharged from the easement. With regard to a right of way, it has been held, that unity of possession of the land in respect of which the way is claimed, and the land over which it passes, will extinguish the right, for the prescription is gone, and the way is against common right (1).

LORD ABINGER, C. B. :

The union of possession in the trustee did not extinguish the easement, but only suspended it during that unity of possession; and upon his parting with the premises to different tenants, the right revived. The verdict is correct, and ought not to be disturbed.

[41] BOLLAND, B., concurred.

ALDERSON, B. :

If I am seised of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands, the easement is necessarily suspended, but it is not extinguished, because there is no unity of seisin; and if I part with the premises, the right, not being extinguished, will revive. That was the case here.

GURNEY, B., concurring—

Rule refused.

(1) 1 Rol. Ab. 935, Vin. Ab. Extinguishment (A.) (C.).

WILLIAMS v. GRIFFITHS.

1835.

*Exch. of
Pleas.*

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(2 Cr. M. & R. 45—48; S. C. 1 Gale, 65; 5 Tyr. 748; 4 L. J. (N. S.)
Ex. 129.)

A. occupied a house and land under B., at the rent of 16*l.* a year, and A., at B.'s request, entered into his employment as a farming bailiff, and to perform other services, in the place of another person who had been employed by A., and had been paid 12*s.* a week. A. continued in B.'s service for more than twelve years, but there was no payment of rent on the one hand, or of wages on the other. In an action brought by A., to recover wages for twelve years, deducting the rent: Held, that this was not such an open account as would take the case out of the Statute of Limitations since the 9 Geo. IV. c. 14; but that there must be a part payment in cash, or what is equivalent to it, to have that effect.

ASSUMPSIT for wages, and for work and labour, and materials found and provided, and for money found to be due upon an account stated. Pleas—First, *non assumpsit*; secondly, *actio non accrevit infra sex annos*. Replication, that the several causes of action mentioned in the declaration did accrue within six years. At the trial before Williams, J., at the last Assizes for the county of Carmarthen, it appeared, that the action was brought to recover the sum of 205*l.* 12*s.* 11*d.* for wages and services for thirteen years or thereabouts, at 12*s.* per week, under the following circumstances: The plaintiff had occupied a house and a few acres of land, under the defendant, at the rent of 16*l.* a year; and had also worked for him as a mason, in erecting walls about his farm-yard, previous to March, 1821. On the 25th of March, 1821, the defendant proposed, that the plaintiff should take the place of a man who had till then been employed by the defendant, at 12*s.* a week, as his farming bailiff, and in the performance of various services; which the plaintiff agreed to do, and continued in such service until a short time before the commencement of the action, but no wages were ever paid on the one hand, nor any rent on the other. At the trial, the plaintiff recovered a verdict for 83*l.* 19*s.* 9*d.*, the learned Judge being of opinion, that this was not such an open account between the parties as to take the case out of the Statute of Limitations; but he gave the plaintiff leave to move to increase the verdict to the sum of 205*l.* 12*s.* 11*d.*, if the Court should be of opinion that the Statute of Limitations was not a bar.

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Chilton now moved accordingly :

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The Statute of Limitations was not a bar, this being a running and open account between the parties : on the debit side, services ; *and on the credit side, rent. In *Catling v. Skoulding* (1), it was held, that if there be a mutual account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as will take the case out of the Statute of Limitations. *Le Blanc*, Serjt., there says in argument, and which was adopted by Lord KENYON, Ch. J., in giving his judgment, that, “when there is an open unliquidated account between the parties, that is evidence of such a promise,” (viz., as would take the case out of the Statute of Limitations,) “because the credit is given on either side on the faith of such account, and every new transaction amounts to an implied acknowledgment of the prior existing debt ; each article of the account on one side being equivalent to a part payment of the bill on the other, and a promise to pay the balance.” In that case, the items consisted of rent accruing half-yearly, on the one side ; on the other, of candles and liquors furnished by the defendants. In the present case, the items on the one side were the rent of 16*l.* a year ; and on the other, the wages and services performed by the plaintiff for the defendant, at 12*s.* per week.

(PARKE, B. : Since Lord Tenterden’s Act, must you not contend, that this was equivalent to part payment, in order to avoid that statute ?)

Perhaps it will not be found necessary to go that length ; for, if the old statute is avoided, it is contended, that the language of Lord Tenterden’s Act does not touch the present case, because this is not an “acknowledgment or promise by words only,” but is a promise implied in law, from the circumstances of the case and the conduct of the parties.

[*47] (PARKE, B. : I think there must be something equivalent to part payment. You must shew an *agreement between the

parties, that the rent should go in part payment of the wages. I think, especially since Lord Tenterden's Act, if not before, that it must be something equivalent to part payment.)

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This, it is submitted, proceeds on the acts and conduct of the parties, and not on any verbal promise or acknowledgment, and is therefore not touched by Lord Tenterden's Act. But even admitting that something equivalent to part payment must be shewn here, as in *Catling v. Skoulding*, "each article of the account on one side is equivalent to a part payment of the bill on the other:" no express agreement between the parties, that the rent should go in part payment, was proved in the case cited, any more than in the case at Bar. This is an important rule to lay down, as it will materially affect all cases in which there have been mutual dealings.

(PARKE, B.: This is not the replication of merchants' accounts, but the general replication, that the action did accrue within six years.)

It is laid down in *Webber v. Tivil* (1) that, "Where there have been mutual current and unsettled dealings and accounts between the parties, and any of the items are within six years, the plaintiff, to a plea of the statute that the defendant did not promise within six years, may reply generally, that the defendant did so promise; and the reason seems to be, because the mutual accounts between the parties, for any item of which credit has been given within six years, are of themselves evidence of there being such an open account, and of a promise to pay the balance; therefore, that sort of evidence is as proper on the issue of *non assumpsit infra sex annos*, as any other evidence of an acknowledgment of the debt by the defendant, or of his promise to pay it." This replication, therefore, is sufficient to meet the present case, as here, there are items down to the commencement of the action.

PARKE, B.:

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I think it was incumbent on the plaintiff to show a part payment in cash, or what is equivalent to it, to take the case out

(1) 2 Wms. Saund. 127 b, n. (7).

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of the statute, since Lord Tenterden's Act. There might have been an agreement between the parties to this effect: that the one should not call upon the other for payment of the money due to him; because he owed him money on the other hand. Before Lord Tenterden's Act, that would have been a sufficient acknowledgment to take the case out of the Statute of Limitations, on the ground that the conduct of the parties was equivalent to an acknowledgment, and of a promise to pay the debt: but it appears to me, that, since the new statute, there must be something equivalent to part payment.

BOLLAND, B.:

I am of the same opinion. Before Lord Tenterden's Act, I think this would have been taken out of the statute; but, since that statute, there must be part payment, or something equivalent to it, to have that effect.

ALDERSON, B., concurred.

Rule refused.

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Pleas.*
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GWILLIM v. DANIELL (1).

(2 Cr. M. & R. 61—72; S. C. 1 Gale, 143; 5 Tyr. 644; 4 L. J. (N. S.)
Ex. 174.)

Assumpsit on an agreement, by which the defendant agreed to sell, and the plaintiff to purchase, all the naphtha which the defendant might make from the 1st June next, for and during the term of two years, say from 1,000 to 1,200 gallons per month, at the rate of 2s. 6d. per gallon, &c.; and it was agreed, that, should the plaintiff be desirous of dissolving the said contract before the expiration of the said term, he should be at liberty so to do, on giving the defendant three months' notice. The declaration averred, that the quantities of naphtha that the defendant ought to have made during a period of ten months, under the agreement, at the rate of from 1,000 to 1,200 gallons per month, and to have sold and delivered to the plaintiff, amounted to a much larger quantity than he had sold and delivered, viz., 7,000 gallons more; yet that the defendant had not sold and delivered the same to him: Held, on demurrer, that the declaration could not be sustained.

THE first count of the declaration stated, for that whereas heretofore, to wit, on, &c., by a certain memorandum of agreement then made between the defendant of the one part, and the

(1) Followed in *McConnel v. Cf. Morris v. Levison* (1875) 1 C. P. D. *Murphy* (1873) L. R. 5 P. C. 203. 155, 45 L. J. C. P. 409.—R. C.

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plaintiff of the other part, the defendant did agree to sell to the plaintiff, and the plaintiff did agree to purchase of the defendant, all the naphtha that the defendant might make from the 1st day of June then next, for and during the term of two years, say from 1,000 to 1,200 gallons per month, proof strength, Sykes' hydrometer, at the rate of 2s. 6d. per gallon imperial measure, to advance 2d. per gallon on every number above proof strength, and to allow in the same proportion for all that might be delivered under proof, to be delivered at Newport, and packages to be returned: payment by acceptance at two months after date, allowing 2½ per cent. discount, or if in cash 5 per cent. discount, from the 14th day of every month, for the quantity delivered in the month preceding. And it was thereby then also agreed, that, should the plaintiff be desirous of dissolving the said contract before the expiration of the said term, he should be at liberty so to do, on his giving the defendant three months' notice in writing; and the said agreement being so made, afterwards, on the day and year first aforesaid, in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform the said agreement, &c. (mutual promises). And the plaintiff says, that although the defendant did after the time of making the said agreement, at various times, from the 1st day of June, 1832, to the 1st day of April, 1833, duly sell and deliver to the plaintiff certain quantities, to wit, 3,000 gallons of the said naphtha, and *although the plaintiff did from time to time during the period last aforesaid duly purchase and accept of the defendant the said last-mentioned quantity of naphtha at the prices, and pay for the same in manner and at the time in the said agreement in that behalf provided, and did from time to time during the same period duly return the packages in the said agreement mentioned to the defendant, and did in all other things perform the said agreement on his part; and although the quantities of naphtha aforesaid that the defendant ought to have made during the said last-mentioned period, being a period of ten calendar months, under his said agreement, at the rate of from 1,000 to 1,200 gallons per month, and to have sold and delivered to the plaintiff, amount to a much greater quantity than

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the said 3,000 gallons, to wit, to 10,000 gallons at the least ; and although a reasonable time for the sale and delivery of the residue, to wit, 7,000 gallons of the said last-mentioned quantity of naphtha has long elapsed, and the plaintiff was always after the making of the said agreement, from the 1st day of June, 1832, during the period last aforesaid, and within a reasonable time after the expiration of each month of the said last-mentioned period, ready and willing to have purchased and received of the defendant the residue of all the said naphtha that the defendant might make at the said rate of 1,000 to 1,200 gallons per month, at the prices in the said agreement in that behalf specified, and to have duly returned the packages of the said naphtha from time to time as in the said agreement is also mentioned, and to have paid for the said naphtha in the manner and at the time in the said agreement also mentioned, whereof the defendant then had notice ; yet the defendant, not regarding the said agreement and his said promise, or either of them, did not at any time during the period last aforesaid deliver, nor hath he hitherto delivered, to the plaintiff at Newport, or elsewhere, any greater quantity of the said 10,000 *gallons than the said 3,000 gallons of the said naphtha, and the residue thereof, to wit, 7,000 gallons, was and is wholly unsold and undelivered by the defendant to the plaintiff, whereby the plaintiff has been deprived of great gains and profits, to wit, 1,000*l.* which he might and otherwise would have acquired by rectifying the said residue of the said naphtha, and selling the same at much advanced prices.

The second count of the declaration resembled the first in substance, and ultimately no question arose upon it.

Pleas—first, as to the first and second counts of the declaration, that before and at the times of making the said agreements respectively, the defendant was a manufacturer of acetate of lime, and carried on the trade and business of such manufacturer, to wit, in the county aforesaid ; and at the said times respectively the defendant intended and expected to continue, and it was expected by the plaintiff that the defendant would continue, to carry on such trade and business for the periods of time to which the said agreements respectively referred, in the

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manner in which he was at the said times carrying it on; and by the course of such manufacture as so carried on and expected to be carried on, naphtha was and was expected and intended to be made and produced, not as the principal object of such manufacture, but as incidental to the manufacture of acetate of lime, the quantity of naphtha so produced being limited by the quantity of acetate of lime which the defendant might have occasion to make in his said business; and that it was not then and there intended or expected that the defendant should, during any part of the said periods of time, make any naphtha otherwise than as aforesaid; of all which premises the plaintiff at the said times respectively had notice; and the defendant avers that the said agreement was made of and concerning such naphtha so expected to be produced in such trade and business, and that the plaintiff and defendant meant and intended by the said first mentioned *agreement, that the defendant should sell, and the plaintiff buy, all such naphtha so to be made in such trade and business as aforesaid, and no more; but that the plaintiff should not be compellable to receive or pay for more naphtha than from 1,000 to 1,200 gallons per month. And the defendant further saith, that during the periods in the said agreement mentioned, he did carry on the said trade and business in the manner as so intended and expected, and did sell and deliver in the manner and on the terms in the said agreement mentioned, the said quantities of naphtha in the said declaration in that behalf mentioned, and that the same was all the naphtha made by the defendant in his said trade and business, and that the defendant did not during the said periods make any more or other naphtha than what he so delivered—concluding with a verification. Second plea—That before the time of the sale and delivery of the said quantities of naphtha in the said declaration mentioned to have been sold and delivered by the defendant to the plaintiff respectively, it was agreed by and between the plaintiff and the defendant, that such quantities of naphtha should be accepted and received by the plaintiff, and sold and delivered by the defendant, instead of the quantities mentioned and agreed by the said first-mentioned agreement to be bought and sold; and that the same were, under such agreements so made in that behalf, bought and sold,

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delivered and received, in full satisfaction of such quantities in such first-mentioned agreement. Verification. Third plea—As to the said first count, that after the making of the said agreement in that count mentioned, and that the whole of the supposed causes of action therein mentioned had accrued, and during the said term of two years therein specified, to wit, on the 25th day of March, in the year of our Lord 1833, in consideration that the defendant, at the plaintiff's request, would agree with the plaintiff to reduce the price of the naphtha to be sold by the defendant to the plaintiff under the said agreement *in the said first count mentioned, from the 1st day of April, 1833, until the expiration of the said term of two years, at 2s. 4d. per gallon, at proof, per Sykes' hydrometer, the plaintiff then promised the defendant to forego all claim in respect of such last-mentioned causes of action, and the plaintiff's damages on occasion thereof, and to accept such agreement in full satisfaction and discharge of such last-mentioned cause of action and damages. And the defendant avers that he did accordingly then agree with the plaintiff to reduce the price of the naphtha to be sold by the defendant to the plaintiff under the said agreement in the first count mentioned, from the said 1st day of April, 1833, until the expiration of the said term of two years, at 2s. 4d. per gallon, at proof, per Sykes' hydrometer, and reduced such price accordingly upon the terms aforesaid; and the defendant then accepted such agreement in full satisfaction and discharge of the said cause of action in the said first count mentioned, and all the plaintiff's damages on occasion thereof. Concluding with a verification. Fourth plea, as to the second count, that there was not any consideration for the said supposed agreement and promise of the defendant in the second count mentioned, as the plaintiff hath alleged; and of this he defendant puts himself upon the country, &c.

To these pleas the plaintiff demurred, and assigned the following causes of demurrer. As to the first plea, that the defendant offered to put in issue as matter of fact the construction of an agreement which was matter of law; that the plea amounted to the general issue, and that it offered to put in issue matters irrelevant and immaterial, and that it was double. As

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to the second plea, that the agreement stated ought to have been shewn to be in writing; that there was no consideration for such agreement; that the delivery of a smaller quantity could not be a satisfaction for the non-delivery of a greater quantity. As to the third plea, that the agreement there stated *should have appeared to be in writing, and signed by the party chargeable; and that the plea was double. And as to the last plea, that it did not confess and avoid, or deny the matters in the second count, but referred to it as the “supposed” agreement; that it was doubtful to which of the agreements mentioned in the second count the plea was pleaded; that it was repugnant, that it ought to have concluded with a verification, and that it was double. Joinder in demurrer.

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W. H. Watson, in support of the demurrer :

All the pleas are bad.

(*Maule*: The defendant means to contend that neither of the counts of the declaration can be sustained.)

The first count is on an agreement to purchase from the defendant all the naphtha he may make during the term of two years, “say from 1,000 to 1,200 gallons per month.” The construction of this contract is a question for the Court; but the first part of the first plea attempts to explain it, by the introduction of extrinsic evidence. By the insertion of the averment that the quantity of naphtha was to be limited by the quantity of acetate of lime manufactured, the defendant has given a totally different construction to the contract stated in the declaration. That contract being for the sale of goods above the value of 10*l.*, and also being a contract not to be performed within the year, is within the Statute of Frauds, and must therefore be taken to be in writing; and being in writing, it cannot be varied by parol. It is true that there are certain cases where parol evidence has been received to explain the meaning of written contracts, but those are cases where there has been a particular course of trade, or where words have acquired a certain mercantile sense, with reference to which the agreement is supposed to have been made. It is for the Court to put

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the proper construction upon a contract of this kind, and the defendant is not entitled to shew what expectations it was *made under. Where the contract was for the purchase of "about 300 quarters, more or less, of foreign rye," Lord TENTERDEN said, it was for the Court to put their construction upon the contract : *Cross v. Eglin* (1).

(PARKE, B. : Does not that part of the plea which seeks to put a different construction upon the contract stated in the declaration amount to the general issue?)

It does so, and that is assigned as one of the causes of demurrer.

The second plea states, that before the time of the sale and delivery of the quantities of naphtha in the declaration mentioned to have been sold and delivered, it was agreed between the plaintiff and the defendant, that such quantities of naphtha should be accepted and received by the plaintiff, and sold and delivered by the defendant, instead of the quantities mentioned and agreed by the first agreement to be bought and sold, and that the same were under such agreements bought and sold, delivered and received, in full satisfaction of such quantities mentioned in the first agreement. This plea is bad on two grounds : first, as already stated, the first agreement is within the Statute of Frauds, and must exist in writing. It was not competent, therefore, for the parties to waive that agreement by a subsequent parol agreement, even before breach : *Goss v. Lord Nugent* (2), where the distinction is taken between waiving a written contract at common law by parol, and waiving a written contract under the Statute of Frauds, and where it was held that in the latter case such waiver could not take place. That the subsequent agreement was by parol, is admitted on the pleadings ; for had it been in writing, it should have been so stated in the plea, the distinction being between the mode of pleading in a declaration and in a plea ; in the former case it not being necessary to shew the agreement in writing, *while it is essential in the latter case : *Case v. Barber* (3). The second

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(1) 36 R. R. 498 (2 B. & Ad. 106).

(2) 39 R. R. 392 (5 B. & Ad. 58 ;
2 Nev. & M. 28).

(3) T. Raym. 450 ; Com. Dig.
Action upon Assumpsit, (F. 3) ; 1
Saund. 211 b, n.

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objection to the plea is, that it purports to shew an accord and satisfaction, and fails to shew the latter; it merely states that it was agreed to take a smaller quantity of naphtha in satisfaction of a greater. To make this plea good, the satisfaction must appear to be reasonable; and therefore it has been held that a plea of the acceptance of a smaller sum of money in lieu of a larger sum, is bad: *Fitch v. Sutton* (1). Upon both the grounds above stated, it is submitted that the second plea is bad.

The third plea is also bad, on the same ground as the second, namely, that it sets up a parol agreement to vary a written contract under the Statute of Frauds. This plea is likewise defective as not sufficiently confessing the cause of action which it afterwards professes to avoid: it attempts to give an answer to the claim of the plaintiff after breach, and states that after "the said supposed causes of action had accrued." Now it ought to have confessed the causes of action, according to the case of *Gould v. Lasbury* (2), where a plea that the defendant was discharged, by the order of the Insolvent Debtors' Court, from the causes of action in the declaration mentioned, if any, was held bad on special demurrer. The word "supposed" is equally objectionable with the words "if any," and equally fails to confess the breach.

(PARKE, B.: It does not appear to me that the word "supposed" is open to the same objection. It is the common form of pleading, and its origin was, that when the general issue was pleaded, together with special pleas, a seeming incongruity might be avoided.)

The last plea pleaded to the second count is bad, because it amounts to the general issue. A denial of *the consideration is a denial of any contract between the parties.

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But the defendant says, that although the pleas may be bad, yet still he is entitled to judgment, on the ground that the declaration cannot be maintained. In order to ascertain whether the counts be good, it is necessary to see what is the proper construction of the contract. The plaintiff contends that the

(1) 5 East, 230.

(2) 1 Cr. M. & R. 254.

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meaning of the agreement is this, that the defendant undertakes to manufacture naphtha for two years, to let the plaintiff have all that he shall manufacture during that period, and that the quantity shall amount to somewhere about 1,000 or 1,200 gallons per month.

(LORD ABINGER, C. B.: Do you contend that at all events the defendant was bound to carry on his business for the purpose of fulfilling this contract with the plaintiff?)

Certainly.

(LORD ABINGER, C. B.: Would there have been a breach of the agreement, if at the end of the first year circumstances over which he had no control had compelled him to relinquish his trade?)

It is not necessary to go the whole length of that proposition. It is sufficient to say that if he voluntarily abandoned the business before the expiration of the two years, it would be a breach. Unless prevented by some inevitable necessity, he must perform his contract. The case of *Lord Shrewsbury v. Gilbert* (1) is a direct authority upon this point. There a lessee covenanted that he would at all times and seasons of burning lime supply the lessor and his tenants with lime, at a stipulated price, for the improvement of their lands and repair of their houses; and the Court held that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises, out of which the lessor could be supplied.

[*70] (LORD ABINGER, C. B.: The meaning of any particular words in a contract *is to be collected not only from the words themselves, but likewise from the context, as was done in the case of *Lord Shrewsbury v. Gilbert*. But what is there in the present agreement to shew an obligation upon the defendant to continue his manufactory for the full period of two years, or to supply, at all events, a quantity amounting to about 1,000 or 1,200 gallons per month? Suppose that the defendant had in any one month

(1) 21 R. R. 367 (2 B. & Ald. 487).

manufactured only 500 gallons of naphtha, and with the view of performing his contract had purchased 500 gallons more, would the plaintiff have been bound to accept the latter quantity?)

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It is conceived that he would have been liable.

Maule, for the defendant, was stopped by the Court.

LORD ABINGER, C. B. :

There is no occasion to inquire whether the pleas be good or not; the question is, whether the declaration can be sustained. The contract there stated is, that the defendant agreed to sell, and the plaintiff agreed to purchase, all the naphtha which the defendant might make from the first day of June then next, for and during the term of two years, say from 1,000 to 1,200 gallons per month. In declaring upon this contract, the plaintiff states, that although he has received 3,000 gallons, the defendant ought under the agreement to have made naphtha at the rate of from 1,000 to 1,200 gallons per month, which would have amounted to a much larger quantity than the 3,000 gallons, that is to say, 10,000 gallons; and he assigns as a breach the not delivering to him the difference between the 3,000 and 10,000 gallons. The declaration contains no averment attributing to the words of the contract any other sense than that which they naturally bear. In cases of mercantile contracts, the words employed may, by usage, bear a very different meaning from their natural import. Thus, by *custom, the word "average" has acquired the sense of "partial," although in its proper sense it has a very different signification. There are numberless other instances in which the meaning of mercantile contracts has been made matter of evidence. In the present case, however, we can only construe the agreement from the bare words employed, there being no averments in the declaration to give a different construction to those words. The agreement there is simply this, that the plaintiff undertakes to accept all the naphtha that the defendant may happen to manufacture within the period of two years. The words "say from 1,000 to 1,200 gallons," are not shewn to mean that the defendant undertook, at all events, that the quantity manufactured should amount to so

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much. If by fraud the defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here it does not appear that in the ordinary course of his manufacture the defendant ought to have produced a larger quantity than he has done; and we cannot, therefore, say that he has broken his contract. If any uncertainty existed with regard to the meaning of the contract, that uncertainty ought to have been removed by the plaintiff, who ought to have put the proper construction upon it. He ought to have explained the meaning of the word "say," and have shewn that it was intended as a sort of warranty. I construe it in favour of the defendant, as meaning merely that in all probability the quantity of naphtha produced will amount to 1,000 or 1,200 gallons. If this was a fraudulent statement, the plaintiff might have avoided the contract, and might have sued the defendant for a fraudulent representation. But the contract in reality was this, "I undertake to sell to you all the naphtha that I may make in my works during the next two years." That it may probably amount in quantity to 1,000 or 1,200 gallons per month, is no part of *the contract. The real contract is for the sale of all the naphtha that the works may reasonably make. It is consistent with the breach assigned in the declaration, that the works are wholly incapable of producing more than the quantity actually delivered.

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The rest of the Court concurring—

Judgment for the defendant.

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MORRIS v. SMITH.

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(2 Cr. M. & R. 120; S. C. 1 Gale, 103; 5 Tyr. 523; 4 L. J. (N. S.)
Ex. 184; 3 Dowl. P. C. 698.)

The addition of the defendant need not be inserted in the writ of summons. It is sufficient to state his residence (1).

In this case, *Miller* moved to set aside the service of the writ of summons for irregularity, on the ground that the defendant being an attorney, he was only described as of Paper Buildings in the Inner Temple, London: his addition of "gentleman" was not given.

(1) Even a wrong address does not now vitiate the writ: *Smith v. Hammond*, '96, 1 Q. B. 571.—F. P.

Per CURIAM :

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The form in the statute 2 Will. IV. c. 39, s. 1, does not require the addition of the defendant to be inserted in the writ. The form of the writ of summons given in the schedule to that Act is, "To C. D., of &c." (1), that is only for the residence, and here it is given.

Rule refused.

BALL v. CULLIMORE AND OTHERS.

(2 Cr. M. & R. 120—124; S. C. 1 Gale, 96; 5 Tyr. 753; 4 L. J. (N. S.)
Ex. 137.)

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A feoffment by a lessor, with livery of seisin made on the land, operates as a determination of a tenancy at will, although the tenant at will be off the land at the time the livery is made, and has had no notice of the determination of the will.

TRESPASS. The first count of the declaration was for breaking and entering the plaintiff's close, situate at Whitfield, in the county of Gloucester, and ejecting the plaintiff therefrom, &c. The second count was for an assault and battery. Pleas, not guilty, and a justification to both counts; upon which, however, no question arose.

At the trial before Alderson, B., at the last Summer Assizes for the county of Gloucester, the only question was, whether the plaintiff was lawfully in possession of a close of land, inclosed from the waste by one Richard Withers, the father of the defendant Thomas Withers. The inclosure from the waste had taken place about *thirty years ago; since which time, Richard Withers had continued in quiet possession of the land until about six or seven years ago, when he agreed to sell the land to his son for the sum of 5*l.*; and the son was in pursuance of that agreement put into possession: but only a small part of the purchase money was paid. Thomas Withers, the son, continued in quiet possession down to the year 1831, when Richard Withers, the father, not having been able to obtain the remainder of the purchase money, at the plaintiff's request,

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(1) The form, in this respect, Judicature Acts, 1873 to 1894. (See remains unchanged by the Rules R. S. C. Ord. II. r. 3, Appendix A, of the Supreme Court under the Part I.)—R. C.

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agreed to sell him the land for the sum of 5*l.*; and the plaintiff having paid the money, a feoffment was accordingly prepared by one Baxter, an attorney, and duly executed by Withers, the father, and the plaintiff, with livery of seisin indorsed. After the feoffment was executed, the attorney of the feoffor proceeded to the land in order to make livery of seisin, for the purpose of delivering possession to the plaintiff; and possession was accordingly delivered to him. It appeared, that, shortly before the parties went on the land, they saw Withers the son upon the land, but there was no person upon the land when they got there. The possession of the land was disputed by Thomas Withers, the son, down to the commencement of the action. The jury found that Thomas Withers did not go off the land for the purpose of giving up possession. The learned Judge directed the jury to find a verdict for the defendants; but gave the plaintiff liberty to move to enter a verdict for him, if the Court should be of opinion, that the livery of seisin was sufficient in point of law to confer a valid title on the plaintiff. *Ludlow*, Serjt., having in Michaelmas Term last obtained a rule accordingly—

Maule, R. V. *Richards*, and *Lumley* shewed cause:

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The land in question having been already sold by the father to the son, and he having been put into possession, the sale to the plaintiff afterwards was a void sale; for, although there may not have been a sufficient conveyance from the *father, yet still the son had a legal possession, which it was necessary should be put an end to, before the father could convey the property. Suppose Withers, the father, had a good right originally to sell and convey away this land, he had disposed of that right by the sale to his son; and having given up possession to him under that contract, he thereby conferred upon him a legal possession; and until that was determined, the sale to the plaintiff was the sale of a mere title, contrary to the Statute of Champerty, 32 Hen. VIII. c. 9.

(LORD ABINGER, C. B.: The father still had the legal estate in him, and therefore had something still to convey, as the

contract of sale was not carried into effect by deed. There was no evidence of any sale but an equitable sale.

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PARKE, B.: The son was not holding adversely, but as tenant at will to his father.)

His rightful title undoubtedly would be as tenant at will, but he was claiming adversely.

(PARKE, B.: The evidence of the contract of purchase, and of his being put into possession under that contract, shewed that he was in possession as tenant at will; that was his legal title.)

It is submitted that the son was in possession holding adversely. But, assuming that the possession was not adverse, there was still the tenancy at will, which it was necessary should be determined; and the entry on the land to give livery of seisin to the plaintiff under the feoffment, in the absence of the tenant, could not have that effect.

(PARKE, B.: There is an authority in Com. Dig. Estates, (H. 6) that if the lessor comes on the land and makes a feoffment, it determines the will.)

It is certainly so laid down, but that must be intended when the tenant is on the land and has notice of it (1). In Com. Dig. Feoffment, (B. 7) it is stated that the livery will be good, if the tenant be only lessee at will, though he dissents, for the livery shall be a determination of the will; and Dyer, 186, *is cited. But it may be argued that the words "though he dissent" imply that possession has been previously demanded, and, after that, the tenant at will became a mere trespasser. The feoffor ought not to be allowed to make the tenant at will a trespasser, which this would have the effect of doing, without his knowledge, or some notice or demand of possession. If entitled to possession

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(1) See Com. Dig. Est. (H. 6) land, he may determine his will in where it is expressly laid down the absence of the lessee." Co. Litt. that, "If the lessor comes upon the 55 b.

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to make livery, he must be entitled to maintain an ejectment, which it has been decided the lessor cannot do without a demand of possession: *Goodtitle d. Gallaway v. Herbert* (1).

(PARKE, B.: The rule of law is, that if the landlord goes upon the land and makes a feoffment with livery, then, whether the tenant be present or absent, it determines the will. It is a notorious act.)

Ludlow, Serjt., and W. J. Alexander, contra, were stopped by the COURT.

LORD ABINGER, C. B.:

A tenant at will has a mere scintilla of interest, which the landlord may determine by making a feoffment with livery upon the land or by a demand of possession. There is no doubt here that the father had contracted to sell the land in question to his son, and that the son had been put into possession under that contract; but the son had only a mere equitable interest, of which a court of law cannot take notice; at law, he had no other title than that of a tenancy at will. Any mode by which the will was determined would entitle the father to maintain an ejectment. If the lessor makes feoffment with livery of seisin on the land it is a solemn act done by him which would have that effect. The general rule of law that any act done upon the land by the lessor in assertion of his title to the possession determines the will, is a sufficient ground for us to say that this feoffment and livery of seisin did determine it. I therefore think that the title of the plaintiff was a good and valid title.

[124] PARKE, B.:

I am entirely of opinion that Withers the son was nothing more than a mere tenant at will. He had nothing more than a lawful possession; and must be considered as having that kind of legal title to the possession, which in law is recognised as a tenancy at will. Then the father executes a feoffment

to the plaintiff, and livery of seisin is given. I am clearly of opinion that the entry on the land to make livery of seisin determined the will. Any act of that kind determines the will whether the tenant knows it or not. It consequently follows, that, by the feoffment and livery, the plaintiff acquired a good title, and that the defendant who entered afterwards was a trespasser.

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BOLLAND, B. :

I am clearly of opinion that the defendant Withers had no title to this land, and the authorities clearly shew that the plaintiff's title was a good title.

ALDERSON, B. :

I am of the same opinion.

WRIGHT v. NEWTON (1).

1835.

(2 Cr. M. & R. 124—128 ; S. C. 1 Gale, 67 ; 5 Tyr. 736.)

*Exch. of
Pleas.*
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A. contracted with B. for the purchase of the goodwill and fixtures of a public-house, at the sum of 120*l.* ; 50*l.* was to be paid as a deposit on the landlord's consenting to the change of tenancy, and, on the remainder of the purchase money being paid, A. was to have possession. The landlord, on application, gave a verbal consent, and the 50*l.* was accordingly paid. A. sent part of his furniture to the house, and went to reside in part of it ; B., however, still continuing to reside and carry on the business there. Some time afterwards, the remainder of the purchase money not having been paid, and possession not having been given up to A., the landlord withdrew his consent : Held, that the contract was conditional on the landlord's consent being obtained ; and that the verbal consent originally given having been withdrawn before any change of tenancy had taken place, it must be considered as not having been given, and, the condition not having been performed, that the money was paid on a consideration which had failed, and that A. might maintain money had and received, to recover back the 50*l.* paid.

ASSUMPSIT for money had and received. Plea, *non assumpsit*.

At the trial before Alderson, B., at the last Lancaster Assizes, it appeared that the defendant being in the occupation of a public-house, and being desirous of leaving it, *entered into a verbal agreement with the plaintiff for the sale to him, on

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(1) *Weston v. Savage* (1879) 10 Ch. D. 736 ; 48 L. J. Ch. 239.

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behalf of a Mrs. Williams, of the goodwill and fixtures of the house, at the sum of 120*l.*, 50*l.* of which was to be paid on the Monday after, if the landlord consented to the change of tenancy, and on payment of the remainder of the money the defendant was to give up possession. The 50*l.* was paid to the defendant on the 19th of May, and on the 20th, on application being made to the landlord, he verbally agreed to accept Mrs. Williams as tenant. In consequence of this, Mrs. Williams, for whom the house had been taken by the plaintiff, removed, and took her furniture to the defendant's house, and went to reside there, and continued there for five or six weeks, and carried on the business, but the defendant and his wife also continued to reside there. It appeared, that, on the 2nd of June, the landlord withdrew his consent to accept Mrs. Williams as tenant. The defendant on being informed of this, said that Mrs. Williams might keep his, the defendant's, name up, and he would give possession in spite of the landlord. Mrs. Williams subsequently, by the defendant's consent, took away her furniture, but the defendant refused to return the 50*l.* The defendant afterwards sold the goodwill and fixtures to another person, who was accordingly let into possession. This action was brought to recover back the sum of 50*l.*, as money had and received for the use of the plaintiff. The learned Baron left it to the jury to say whether the parties had agreed to rescind the contract, and if they were of that opinion, he directed them to find a verdict for the plaintiff; which they accordingly did.

Cresswell now moved by leave of the learned Baron to enter a nonsuit:

[*126] There was no evidence to shew that the parties had agreed to rescind the contract, *so as to make this money had and received to the use of the plaintiff. The landlord's withdrawing his consent could not have that effect, as there must be the consent of all the parties to the contract. The evidence is, that the defendant agreed to let Mrs. Williams take her furniture away, but that he refused to return the 50*l.*; and therefore, there is no evidence of any consent to rescind the contract. The

plaintiff ought, therefore, to have declared specially for a breach of the contract, and could not maintain money had and received.

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(PARKE, B. : Does it appear that Mrs. Williams went in as tenant? She went there with her furniture, but the defendant and his wife still remained there and carried on the business. Had not the landlord a right to withdraw his consent? And was not the contract conditional upon the landlord's consent being obtained?)

There could be no right to rescind after there had been a part performance of the contract. The goods were not taken to the defendant's until after the landlord's consent had been given, and 50*l.*, part of the sum agreed upon, had been paid. It could not, therefore, be said that the contract had entirely failed.

(ALDERSON, B. : The defendant carried on the business afterwards, and Mrs. Williams was not to have possession until the rest of the money was paid, and the licence transferred.

PARKE, B. : Was the landlord's consent binding upon him? Mrs. Williams did not take possession as tenant.)

The consent was binding on the landlord, as it operated as an agreement for a parol demise, which need not be in writing.

(PARKE, B. : An agreement for a demise to commence *in futuro* must be in writing. The parol consent was not sufficient to give an *interesse termini*. Was not the whole matter executory until Mrs. Williams took possession as tenant? It is a condition in the agreement, that the landlord's consent shall be obtained. If the condition is not performed, *then the plaintiff is entitled to recover back the 50*l.*) [*127]

If there had been any failure on the defendant's part to perform the contract, then it is admitted, that the plaintiff might have been entitled to recover the 50*l.* If the plaintiff had paid the remainder of the money before the 2nd of June, possession of

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the premises would have been given to Mrs. Williams as tenant, before the landlord had withdrawn his consent. As it was Mrs. Williams's own fault that the money was not paid before the consent was withdrawn, the plaintiff cannot be entitled to recover.

PARKE, B. :

It seems to me that this was a contract, with a condition that the landlord's consent should be obtained ; and the question is, has that condition been performed ? There was a deposit of 50*l.* made upon the landlord's agreeing to take Mrs. Williams as tenant, but the remainder of the money not having been paid, and Mrs. Williams not having entered into possession as tenant, the landlord subsequently withdrew his consent. I think it must be taken as if the landlord never has consented ; and if so, the condition has not been performed. There would be nothing to bind the landlord unless there had been an actual transfer of the possession. The money was paid on a consideration which has failed, and therefore the plaintiff is entitled to recover it back, as money had and received to his use. The simple question is, whether the landlord's consent of the 19th of May was binding upon him ? I think it was not, and therefore the condition was not performed. There must be no rule.

BOLLAND, B. :

The consent would have been sufficient if Mrs. Williams had acted upon it before it was withdrawn, by paying the remainder of the purchase money, and getting into possession as tenant. As it was withdrawn before Mrs. Williams took possession as tenant, I think that the verdict was right.

[128] ALDERSON, B. :

I think that the defendant never gave up possession to Mrs. Williams as tenant. He kept possession of the house for a very good reason ; because the remainder of the purchase money was not paid.

Rule refused.

CHALMERS *v.* PAYNE AND ANOTHER.

(2 Cr. M. & R. 156—159; S. C. 1 Gale, 69; 5 Tyr. 766; 4 L. J. (N. S.) Ex. 151.)

1835.

*Exch. of
Pleas.*

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In an action for a libel, on not guilty pleaded, it appeared that the libel (which was contained in a newspaper) purported to be the account of a trial of a former action, brought by the same plaintiff for a libel against third parties, and after stating the libel in the original action, and the facts proved by the then defendants, and the summing up of the Judge, stated that the jury found a verdict for the plaintiff with 30*l.* damages. No evidence was given as to any such trial having, in fact, taken place, or whether the report was fair or not. The Judge left it to the jury to say, whether the report, although it contained some allegations injurious to the plaintiff, was, if taken altogether with the statement of the verdict being in his favour, injurious to the plaintiff on the face of it; and the jury having found for the defendant, the Court refused to grant a rule for a new trial.

THIS was an action against the defendants for a libel, published by them in the *Morning Post* newspaper.

The libel for which this action was brought professed to contain the account of the trial of an action, brought by the present plaintiff against the proprietors of the *John Bull*, for a libel. After stating what the libel was, and the facts proved at the trial by the defendants in the original action, under a justification, together with the summing up of the CHIEF JUSTICE in that action, it stated also, that the jury found a verdict for the plaintiff with 30*l.* damages. The defendants in the present action pleaded the general issue.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after last Hilary Term, the newspaper containing the report was read in evidence, but no evidence was adduced to shew whether the trial had taken place or not, or whether the report was or was not a fair and impartial report of the trial. The learned Chief Baron left it to the jury to say, whether the statement was made in such a manner as to shew that it had been published with a malicious motive; and if they were of that opinion, then to find a verdict for the plaintiff, but if otherwise for the defendants. The jury found a verdict for the defendants.

Stammers now moved for a new trial, on the ground of misdirection, and of the verdict being against the evidence.

CHALMERS It ought not to have been left to the jury to consider whether
v.
PAYNE. this statement was published from malicious motives or not;
it not being in the nature of a privileged communication,
and there being no justification on the record that was not
in issue.

[*157] (LORD ABINGER, C. B.: There was no evidence that it was
a mere pretended report of a fictitious *trial. I told the jury
that if they thought the statement of the facts proved at the
trial were misstated, so as to be injurious to the plaintiff's
character, or were published maliciously, then they ought to find
for the plaintiff.)

It is submitted that the question of malice was not a question
which ought to have been left to the jury, but was a necessary
inference of law from the libel itself: *Bromage v. Prosser* (1).
Besides, there was no evidence to shew that there had been any
such trial as that reported.

(LORD ABINGER, C. B.: I put it to the jury, that if they
thought that the defendants had invented it, and that there
had in fact been no trial at all, then they must find for the
plaintiffs; but there was no evidence that it was so.)

If there had been such a trial, the defendants were bound
to plead it in justification, and that the report was a correct
account of it; but it not having been pleaded must be taken
not to have existed, and the jury ought to have been directed
to find for the plaintiff, the publication of the libel having
been proved.

LORD ABINGER, C. B.

I am of opinion that there is no ground for a rule in this case.
The question is, whether the whole publication, taken together,
is injurious to the character of the plaintiff. I apprehend that
where a publication is injurious on the face of it, it is a wrong
from which malice will be inferred, and which makes it actionable

(1) 28 R. R. 241 (4 B. & C. 247).

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whether any injury was intended or not. That is a principle which is not confined to libel only, but is a general principle applicable to other cases. A party is not justified in committing an action injurious to another because the party does not mean to do any injury. (The learned CHIEF BARON here referred to the case of *The Earl of Lonsdale v. Littledale* (1).) But there may be cases where there is actual and wilful malice in addition *to the injury itself, and that aggravates the wrong, and the jury in such a case ought to award greater damages. The first question, however, for them to determine in cases of libel is, whether the publication is injurious to the character of the plaintiff. The statement may be made in such a manner as to be injurious to the plaintiff's character, or it may not be calculated to injure him. In criminal cases, in modern times, it is expressly provided, that the jury shall say whether the publication is a libel or not. I think most properly so. Who can tell so well what is the effect of an alleged libel on a man's character, as a jury taken impartially from persons in his own station and rank of life. In this case, I left it to the jury to say, whether the report, though it might contain some allegations prejudicial to the plaintiff, yet if taken altogether with the verdict in his favour, was on the face of it injurious to the plaintiff; and if they thought it was not, I directed them to find for the defendants. If, on the contrary, they thought that the statement of the verdict being in his favour was no palliation, and that it was on the whole injurious to his character, to find a verdict for him. The jury took the report out with them, and found it was not.

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BOLLAND, B. :

In the case of *Dicas v. Lawson* (2), which occurred here in the last Term, this Court came to a similar decision to the present.

ALDERSON, B. :

In *Dicas v. Lawson* I directed the jury to look to the whole

(1) 2 H. Bl. 269.

(2) 1 Cr. M. & R. 934.

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of the publication to see whether it was calculated to injure the plaintiff's character. The publication there complained of was the report of a trial, in which there were strong observations on the character of the plaintiff, but in which the plaintiff had recovered a verdict for 30*l*. It was said that the report was libellous, because it set forth the charge made on the trial against *the plaintiff. I left it to the jury to say whether, taking the whole of the publication altogether, they thought it likely to depreciate his character. The jury thought not; and on an application for a new trial, this Court approved of my direction. I quite agree, that, where slanderous words are used, which are actionable in themselves, and no justifiable cause is shewn for uttering them, the law will presume malice from the language itself. But the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together. Then, it is said, that there is no evidence of there having been such a trial in fact. But we cannot suppose that it was a mere invention; we cannot assume that newspapers publish mere imaginary accounts of trials. The question being left to the jury, whether there was any thing in the mode of publication which indicated malice, was an additional advantage to the plaintiff.

Rule refused.

1835.

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Pleas.*

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STARTUP AND ANOTHER v. CORTAZZI (1).

(2 Cr. M. & R. 165—170; S. C. 5 Tyr. 697; 4 L. J. (N. S.) Ex. 218.)

In assumpsit for a breach of contract, in not delivering a quantity of linseed pursuant to a contract of sale, it appeared in evidence, that the plaintiffs, pursuant to contract, had paid part of the purchase money to the vendor in advance; that the defendant, at the time when the linseed ought to have been delivered, had given notice of his inability to perform the contract, but the money was not returned until after the action was commenced, when the amount was paid into Court, with interest up to the time it was so paid in, as a condition for a commission to examine witnesses abroad, and was only obtained out of Court by the plaintiffs

(1) Sale of Goods Act, 1893, s. 51.

a short time before the trial : Held, that, in estimating the damages, the plaintiffs were not entitled to take the price of linseed at the time of the trial as a criterion ; and the plaintiffs not having proved that they had sustained any special damage from the non-delivery of the seed, and the non-return of the money, that the repayment of the money advanced, with simple interest upon it, and payment of the difference between the contract price and the price of the linseed at the time when it ought to have been delivered, was that to which the plaintiffs were entitled ; and the jury having found accordingly, that the verdict was right.

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ASSUMPSIT for the nondelivery of Odessa linseed, pursuant to a contract of sale. The defendant pleaded the general issue, and also a special plea, in excuse of performance ; but, to the latter plea, the plaintiffs had demurred, and judgment was thereupon given for the plaintiffs. At the trial of the cause before Lord Abinger, C. B., at the London sittings after last Hilary Term, it was proved, that, on the 18th of June, 1833, the plaintiffs and defendant, through the medium of a broker, entered into a contract, by which the defendant agreed to sell 2,100 quarters of Odessa linseed, warranted good and marketable, and equal to the average shipments of the season, at the rate of 30s. for each quarter, free on board a ship to be provided by the buyer. The quantity to be estimated at the rate of 100 chetwerts to 73 quarters ; to be shipped on board the buyer's vessel in all October or *November then next ; the amount to be paid for, half by bills on buyers, three months from date of advice of sale reaching Odessa, and the remainder on banker at London, at three months from the date of the bill of lading and shipment. The plaintiffs' vessel arrived at Odessa in October, remained there some time, and returned without a cargo ; the defendant having given notice previously, that the contract would not be fulfilled. On the 15th of October the plaintiffs paid the defendant 1,575*l.*, being a moiety of the purchase money of the presumed cargo. Previous to the argument on the demurrer, the defendant applied for a commission to examine witnesses at Odessa, which was granted on the 15th of September, 1834, on his paying that money with interest into Court ; and on the 2nd of February, 1835, the defendant paid 524*l.* additional into Court, and the whole sum of 2,172*l.* was ordered to be paid over to the plaintiffs. It appeared that, in February, 1834, when the cargo would have arrived if the seed had been delivered, the price of Odessa linseed

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was 50s. per quarter ; at the time of the trial it would have been about 56s. The defendant had paid into Court at the rate of 47s., which was about the price of the seed when the notice that the contract would not be completed was given. The plaintiffs contended, that, as they had paid a portion of the purchase money, which the defendant had retained until it was paid into Court, in September, 1834, and which the plaintiffs did not obtain until February, 1835, they were entitled to damages according to the price at which the seed was selling at the time of the trial. His Lordship told the jury, that, in his opinion, the plaintiffs were not entitled to treat this as a case resembling contracts for the replacing of stock, where the damages are estimated at the price of the Funds, and that they were not entitled to damages according to the then price of the seed ; that, taking the price at the time when the cargo would have arrived, it appeared to him that *enough had been paid into Court ; but, with these observations, he left the case to the jury for their determination. The jury having found a verdict for the defendant,

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Maule now moved for a new trial, on the ground of misdirection :

It is admitted, that, in ordinary cases, the proper mode of estimating the damages for the nonperformance of a contract is, to take the price of the article at the time when the contract ought to have been performed. In the present case, however, the plaintiffs advanced money for the purchase of the linseed, and were deprived of the use of that money until February last. That places them in the same situation as the lenders of stock, who are entitled to take the price at the time of the trial. In *Gainsford v. Carroll* (1), where it was held, that, in *assumpsit* for a breach of contract, in not delivering a quantity of bacon upon a given day, the damages must be estimated by the price of the goods at or about the time when the contract was broken, and not at the time when the damages were assessed ; the Court said, “ In the case of a loan of stock, the borrower holds in his

(1) 26 R. R. 495 (2 B. & C. 624 ; 4 Dowl. & Ry. 161).

hands the money of the lender, and thereby prevents him using it altogether. Here, the plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken." The principle there laid down, it is submitted, is applicable to the present case; as, in this case, the plaintiffs advanced their money to the defendant on the faith of this contract, and the defendant, by retaining the money, prevented them from using it, and of applying it in the purchase of other linseed. If they had had their money, they might have applied it in the purchase of other merchandize, by which they might have obtained a profit equivalent to the amount of the damages now claimed.

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LORD ABINGER, C. B. :

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The plaintiffs did not prove that they wanted this seed for any particular purpose, or that they sustained any peculiar injury from its nondelivery. I told the jury, that neither the witnesses nor the plaintiffs had pointed out any precise line, which should mark the proper estimate of the damages; for they had not stated what they had intended to do with the seed, whether to crush it, or to sell it. The plaintiffs, however, insisted that they were entitled to the profits which they might possibly have made upon it, if it had been delivered. The jury appeared to me to wish to give no more than the money advanced, and interest upon it. I am not aware of any rule for estimating damages for speculative profits, besides taking the interest on the money advanced. It was not proved that the plaintiffs could have made more than 5 per cent. on that money, or that they had not credit at their bankers to that extent, and thereby had sustained any peculiar inconvenience. The money had been paid into Court, and the plaintiffs received it as soon as the practice of the Court allowed them to do so. I felt a difficulty as to how the damages ought to be computed; but one of the witnesses gave something like a rule, which I pointed out to the jury. He said that Odessa linseed was about the same quality as Sicilian linseed, though it usually sold at a somewhat lower rate. The ship arrived in England in March. He stated, that at that time Sicilian linseed was well sold at 50s. and that he himself had furnished good

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seed at that price ; and deducting 2s. for the difference in value, the fair price of the Odessa seed was 48s. : and, allowing a discount, the price would have been about that which the defendant has paid into Court. It is to be remarked that, by the terms of the contract, supposing the cargo to have been shipped in pursuance of it, the plaintiffs would have been obliged to pay the residue of the purchase money at that time. I did not, however, prescribe any line to the jury *upon which they ought to proceed ; but I told them they ought not to give speculative or vindictive damages.

BOLLAND, B. :

The case appears to me to have been left to the jury in the only way in which, upon the facts, it could have been properly left to them. There was nothing to guide them as to the particular mode by which the damages ought to be estimated. The LORD CHIEF BARON could only caution them against giving speculative or vindictive damages ; and we have seen what sort of damages might be required, if speculative damages were allowed to be given in actions like the present.

ALDERSON, B. :

The only question in the case was, as to the amount of the damages. The contract was, to deliver a certain quantity of linseed at a certain time, namely, on the arrival of the ship in London. Previously to that period, a notice was given by the defendant that he was unable to perform his contract. It appears that the price at that time was not the proper criterion for estimating the damages ; for, as the plaintiffs had already parted with their money, they were not then in a situation to purchase other seed. The more correct criterion is the price at the time when the cargo would have arrived in due course according to the contract ; when, if it had been delivered, the plaintiffs would have been enabled to resell it. Another criterion is, to consider the loss of the gain which the party would have made, if the contract had been complied with. In the present case, the loss which the plaintiffs have sustained arises from their having been kept out of their money. That is a matter to

be calculated by the interest of the money up to the time when, by the course of practice, the money could have been obtained out of Court. It appears from the report of the trial, that there were no circumstances submitted to the jury to shew that the plaintiffs had sustained *any special damage. The verdict is, therefore, in my opinion, right.

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[*170]

GURNEY, B., concurred.

Rule refused.

MORRIS AND ANOTHER v. PARKINSON.

(2 Cr. M. & R. 178—180; S. C. 5 Tyr. 772; 4 L. J. (N. S.) Ex. 220; 3 Dowl. P. C. 744.)

1835.

*Exch. of
Pleas.*

[178]

Where the Master on taxation decided that one of the actions in which the costs had been incurred, had been improperly brought, and disallowed those costs, by which more than one-sixth of the bill was taken off: Held, that the attorney was bound to pay the costs of taxation.

In this case the Master, on taxation of the plaintiff's bill of costs, decided that one of the actions in which the costs had been incurred had been improperly brought, and on that ground disallowed those costs, by which more than one-sixth of the bill was taken off.

Dowling now moved for a rule to shew cause why the defendant should not be allowed the costs of taxation. This is the ordinary application under the statute 2 Geo. II. c. 23, s. 23 (1); and it was decided in *Higgins v. Woolcott* (2), that where an attorney's bill is reduced on taxation by a sixth part, that the client is entitled to the costs *of taxation, as they are not in the discretion of the Courts. He also cited *Elwood v. Pearce* (3), and *Baker v. Wills* (4).

[*179]

Chilton shewed cause in the first instance:

In *White v. Milner* (5) it was held that the attorney is not compellable to pay the costs of taxation where the deduction of one-sixth is occasioned, not by particular items being reduced

(1) See now 6 & 7 Vict. c. 73, s. 37.—R. C.

(3) 8 Bing. 83; 1 Moore & Scott, 159.

(2) 29 R. R. 389 (5 B. & C. 760; 8 Dowl. & Ry. 589)

(4) 2 Cr. & M. 415.

(5) 2 H. Bl. 357.

MORRIS by taxation, but by a whole branch of it being disallowed. That
v. case is in point, as here the Master disallowed one branch of
PARKINSON. the bill. That decision was recognised by the Court of King's
Bench in the case of *Mills v. Revett* (1).

LORD ABINGER, C. B.:

It is not necessary for us to go the length of saying that the case of *White v. Milner* has been overruled. I take that case to have decided this, that where an attorney charges a person wrongfully with the costs, and the whole are disallowed, the bill is not to be considered as taxed. But if when, for a particular reason, the Master thinks that the attorney ought not to have charged a specific item, and disallows it, by which the bill is reduced by one-sixth, the attorney is not to pay the costs of taxation, it would follow that in every case where an item is inserted which the Master disallows as not chargeable at all, it would be said that that item was not taxed, and consequently the bill not reduced by taxation. We cannot lay down the rule as contended for, as such a decision would open the door to controversy in every case where the bill was reduced one-sixth on taxation.

PARKE, B.:

[*180] It is not necessary to say whether the decision in the case of *White v. Milner* be right or wrong, *because this is distinguishable from that case. There the sum was struck out because the defendant was not chargeable with it, and it ought to have been charged to another person. In the present case the sum in question was disallowed, because the attorney ought not to have charged this item at all, and therefore it ought never to have been inserted in the bill.

BOLLAND, B.:

There was a case which came before this Court from the northern circuit, where a sum of 15*l.*, being the amount of fees to counsel advanced by the client to the attorney, was struck out of the bill; and the question whether the general rule on

(1) 40 R. R. 455 (1 Ad. & El. 856; 3 Nev. & Man. 767).

taxation applied was brought before this Court, and they decided that it did, and the attorney was compelled to pay the costs of taxation.

MORRIS
F.
PARKINSON.

GURNEY, B., concurred.

Rule absolute, with costs.

SWAIN AND OTHERS, ASSIGNEES, &c. v. LEWIS.

(2 Cr. M. & R. 261—263; S. C. 5 Tyr. 998; 4 L. J. (N. S.)
Ex. 249.)

1835.

*Exch. of
Pleas.*

[261]

Secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without any notice having been given to produce it.

ASSUMPSIT on a bill of exchange drawn by the defendant, and indorsed to the bankrupt before his bankruptcy. At the trial before Arabin, Serjt., at the Sheriff's Court in London, it was proved that notice of dishonour was given in due time to the defendant by a letter sent by post, but no notice to produce the letter had been given. The plaintiffs proposed to prove its contents by an entry of the terms of it made in a book at the time it was sent. The defendant's counsel objected that secondary evidence could not be given of the letter without a notice to produce it. The objection was overruled, and the plaintiffs had a verdict. In Hilary Term *Mansel* obtained a rule *nisi* for a new trial on the same ground: against which, in Easter Term,

Humfrey shewed cause, and relied on *Kine v. Beaumont* (1), as an express authority in favour of the plaintiffs, and which had been confirmed by several later cases at Nisi Prius.

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Mansel, contra :

In that case a copy of the original letter was produced, and it was considered in the nature of a duplicate original. Here, a mere entry in a book was the whole evidence. Besides, the authority of *Kine v. Beaumont* is very questionable. There were

(1) 24 R. R. 678 (3 Brod. & B. 288; 7 Moore, 112).

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 LEWIS.

several earlier decisions the other way: *Langdon v. Hulls* (1), *Shaw v. Markham* (2), *Philipson v. Chase* (3). Nor is it consistent with the principles of law on which secondary evidence is admissible. The original notice itself ought primarily to be produced as the best evidence, and therefore the defendant ought to have notice to produce it: Starkie on Evidence, tit. Notice.

LORD ABINGER, C. B.:

As this is a point of some importance in practice, and the case of *Kine v. Beaumont* has not, perhaps, been altogether approved of, we will take time to consider it.

Cur. adv. vult.

In the present Term his Lordship delivered the judgment of the COURT:

[*263] In this case the question was, whether, in an action on a bill of exchange against the drawer or indorser, when it became essential to prove notice of dishonour, and it appeared that such notice was given by letter, it was necessary to give a notice to produce such letter, before secondary evidence could be given of its contents: and a case in the Common Pleas was discussed before us, in which it was decided, after consideration, and after conference with some others of the Judges, that notice *to produce was not necessary in such a case. The Judges have conferred together on the point, and it is considered best to adhere to that decision in the Common Pleas: and it is now, therefore, to be considered as settled, that it is not necessary to give a notice to produce a notice of dishonour of a bill of exchange. The rule must consequently be discharged.

Rule discharged.

(1) 5 Esp. 156.

(2) 1 Peake, 221.

(3) 11 R. R. 678 (2 Camp. 110).

ATTORNEY-GENERAL *v.* SCHIERS AND ANOTHER.

(2 Cr. M. & R. 286—289; S. C. 1 Gale, 223; 5 Tyr. 1029; 4 L. J. (N. S.) Ex. 324.)

1835.

Revenue.

[286]

A vessel which comes within a league of the coast of the United Kingdom, having had contraband goods on board in the same voyage, though she has unshipped them before coming within the league, is liable to forfeiture under the 3 & 4 Will. IV. c. 53, s. 2 (1).

THIS was an information filed by the *Attorney-General*, upon the stat. 3 & 4 Will. IV. c. 53, s. 2, praying the forfeiture of a vessel called the *Bien Aimé*, of Cherbourg, seized by the officers of Customs; for that, being a foreign vessel, not being square rigged, she was, on the 6th of July, 1834, found on the high seas within one league of the coast of the United Kingdom, that is to say, within one league of the coast of Dorset, to wit, at Ratcliff, the said vessel then and there having had on board certain parcels of foreign spirits, in casks of prohibited size, &c. Another count stated that the vessel was discovered to have been on the high seas, within one league &c., having had on board the contraband spirits. At the trial before Lord Abinger, C. B., at the Middlesex sittings after Easter Term, the facts proved were in substance as follows. *Some of the officers of the Portland coast guard station, being out in boats on the night of the 6th of July, 1834, between twelve and one o'clock, boarded a boat called the *La Marie*, about half a mile from the shore, and found in her three French and two English sailors, without provisions or compass, and seventy-one casks of foreign spirits, in half ankers, slung. They took her to Chisel Cove, but before arriving there, and about half an hour after her capture, saw the *Bien Aimé* lying becalmed at the distance of three quarters of a mile from them, and about half a mile from the shore. The chief officer of the coast guard immediately went off to her, and, on boarding and searching her, found marks of casks in the hold, a strong smell of spirits, the clothes of the boat's crew, and other appearances, which left no doubt that the *La Marie* had put off from her with the contraband spirits. The defendant's counsel, however, contended that, to support a

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(1) Since repealed. But the decision seems to be applicable to s. 179 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), as amended by 53 & 54 Vict. c. 56, s. 1.—R. C.

A.-G.
v.
SCHIESS.

condemnation on the statute on which the information was founded, it must appear that the vessel had the prohibited goods actually on board within a league of the coast, of which there was no proof in this case. The LORD CHIEF BARON told the jury, that, in his opinion, the vessel was liable to forfeiture, if she unshipped the prohibited goods more than a league off the coast, and afterwards came within that distance. A verdict having been found for the Crown,

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John Jervis moved for a new trial, and submitted that the learned Judge had put an erroneous construction on the Act of Parliament. The words "having had on board" must be taken in connection with the words "so found or discovered," that is, found or discovered "to have been within one league of the coast." The object of the enactment was to provide against the floating or sinking of the contraband goods within the distance. It is not sufficient to subject the vessel to forfeiture, that she has unshipped *the goods at a greater distance, and afterwards come, as an innocent vessel, within the prohibited limits: otherwise it will follow that if a vessel, having had contraband goods on board in the East Indies, comes at any time afterwards within the prohibited distance; or if, having put off from a French port with them on board, she has repented, and sent them back, but proceeds herself, she will be forfeited.

(LORD ABINGER, C. B.: You put an extreme case one way, let us put one the other: suppose she unships them a hundred yards beyond the league? I apprehend the object of the statute was to make the vessel seizable if found within a league, having had the prohibited goods on board in that voyage. The being found within a league is taken as evidence of the guilty intention to land them.)

Here, however, the Crown have, in their information, put a construction on the statute which binds them; the words "then and there" must be referred to the former words, "within a league &c.," and import that the vessel had the goods on board within that limit.

The COURT, having intimated that there was nothing in the latter objection, took time to look into the Act of Parliament; and, on a subsequent day,

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LORD ABINGER, C. B., said:

In this case we delayed granting a rule until we had looked more fully into the statute. On looking into it we think there is no foundation for the distinction taken by *Mr. Jervis*. The provision which renders a vessel liable to forfeiture, having had contraband goods on board before entering the prohibited limits, is applicable only to the particular voyage in which she both discharges the goods and enters the prohibited limits. It cannot be supposed that the Legislature contemplated anything so absurd as to provide against the case of a vessel having had prohibited goods on board somewhere or other twenty years before, and *then coming, twenty years afterwards, within a league of the coast. The statute seems indeed to be directed against the very case of a vessel, having had goods on board in prohibited packages, discharging them before she enters the specified limits, and then following, to assist in the landing or receive back the crew. There will therefore be no rule.

[*289]

Rule refused.

COCK v. COXWELL (1).

(2 Cr. M. & R. 291—292; S. C. 1 Gale, 177; 5 Tyr. 1077; 4 Dowl. P. C. 187.)

1835.

*Exch. of
Pleas.*

[291]

An alteration in a bill of exchange, after acceptance, may be taken advantage of on a plea that the defendant did not accept the bill.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, dated 15th December, 1834, payable two months after date. Plea—that the defendant never accepted the bill of exchange in the declaration mentioned. At the trial, before the undersheriff of Middlesex, the defence was, that the bill had been altered in its date after the acceptance, and without the knowledge of the defendant. A verdict having been found for the defendant,

(1) Followed in *Hirschman v. Budd* (1873) L. R. 8 Ex. 171; 42 L. J. Ex. 113.—R. C.

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v.
COXWELL.

Thomas now moved for a new trial, on the ground that the defence on which the defendant relied was not open to him on the plea of non-acceptance. That plea only put in issue the fact whether the defendant accepted or not: the alteration after acceptance ought to have been specially pleaded, as it was in *Atkinson v. Hawdon* (1); it is strictly a matter in confession and avoidance.

(ALDERSON, B.: He has pleaded it specially, by saying that he did not accept the bill you declared upon and produced in evidence, but a different *one.)

[*292]

The plea of *non est factum* would not put in issue fraud or misrepresentation in obtaining the deed.

(GURNEY, B.: It would put in issue an alteration after the execution.)

In a late case in the Common Pleas (2), it was held that an objection that the contract declared on (an assignment of copy-right) ought to have been in writing, could not be taken without being specially pleaded. He urged also that the alteration, having been made before the indorsement to the plaintiff, was immaterial, this being an accommodation bill, which could not be said to have been negotiated till it came into the hands of a holder for value.

BOLLAND, B.:

We think the only point we need consider is, whether the plea in question is a sufficient answer. The defendant says in substance, the instrument on which you claim against me I never accepted. It cannot be said to be the same instrument if there has been any alteration.

ALDERSON, B.:

It amounts to saying that he did not accept the bill set out in the declaration.

Rule refused.

(1) P. 493, *ante* (2 Ad. & El. 628; 4 Nev. & M. 409). (2) *Barnett v. Glossop*, 1 Bing. (N. S.) 633.

PELLECAT *v.* ANGELL.

(2 Cr. M. & R. 311—314; S. C. 1 Gale, 187; 5 Tyr. 945; 4 L. J. (N. S.) Ex. 326.)

1835.

*Exch. of
Pleas.*

[311]

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows, at the time of the sale and delivery, that the buyer intends to smuggle them into this country.

DRAWER against acceptor of a bill of exchange for 63*l.* 4*s.* made at Paris, dated 5th April, 1830, payable three months after date to the plaintiff or his order. Plea, that before the acceptance of the said bill of exchange, it was, in parts beyond the seas, in France, agreed between the plaintiff and the defendant, then being a subject of our lord the King, as the plaintiff well knew, that the defendant should buy of the plaintiff divers of his goods, and at a small price, being less than the real value of the same, for the purpose of the defendant getting the same, against the laws of this realm, smuggled into this kingdom, and without any of the duty then payable on the importation thereof being paid thereon: and that the plaintiff did, in pursuance of such unlawful contract, in the said parts beyond the seas, sell the said goods to the defendant for the purpose aforesaid, and the defendant, in the said parts beyond the seas, afterwards, and in payment of the said goods, and for no other consideration whatever, accepted the said bill of exchange; and that he never had any other consideration for accepting or paying the same, or any part thereof. Special demurrer, assigning for cause, that the plea did not state or shew that the plaintiff had any participation in the alleged smuggling of the said goods *into England, and did not state or shew any other matter or thing to invalidate the contract so made between the plaintiff and the defendant. Joinder.

[*312]

Humfrey, for the plaintiff:

This plea is no answer to the action, inasmuch as it does not shew that the plaintiff took any part in the illegal transaction in question; but, at the most, only that he knew of the illegal purpose. That knowledge does not invalidate the contract. *Holman v. Johnson* (1) is a direct authority for the plaintiff. It

(1) Cowp. 341.

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was there held, that an action lay for goods sold abroad, which were prohibited here, if the delivery was complete abroad, though the vendor knew they were to be run into England. *Biggs v. Lawrence* (1), *Hodgson v. Temple* (2), *Brown v. Duncan* (3), and *Wetherell v. Jones* (4), are additional authorities in favour of the plaintiff. The plaintiff is not a British subject, and owes no allegiance to the revenue laws of this country.

(BOLLAND, B., referred to *Waymell v. Reed* (5).)

There the seller took part in the illegal transaction, by packing the goods in prohibited packages.

Mansel, for the defendant :

The contract stated in the plea, and admitted by the demurrer, is a contract to sell the goods at less than their real value, for the purpose of promoting the illegal purpose of smuggling them. It was a part of the contract itself, therefore, that they were to be sold for the express purpose of defrauding the revenue laws. Nor does it appear that the contract was complete abroad ; no delivery abroad is stated, or averred in reply by the plaintiff.

[*313] (LORD ABINGER, C. B. : You do not say the goods were delivered in England—you ought to have made *out the illegality.)

The contract is illegal if the seller is privy to the illegal purpose : *Catlin v. Bell* (6). Where premises are let for an immoral or illegal purpose, whether it is carried into effect or not, that is sufficient to disable the party from recovering for the occupation of them.

LORD ABINGER, C. B. :

I am of opinion that this plea is bad. It is perfectly clear that where parties enter into a contract to contravene the laws of their own country, such a contract is void : but it is equally

(1) 1 R. R. 740 (3 T. R. 454).

(2) 14 R. R. 738 (5 Taunt. 181).

(3) 10 B. & C. 93 ; 5 Man. & Ry. 114.

(4) 3 B. & Ad. 221.

(5) 2 R. R. 675 (5 T. R. 599).

(6) 4 Camp. 183.

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clear, from a long series of cases, that the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this; except, indeed, that where he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act. But there is nothing illegal in merely knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of another country. It would have been most unfortunate if it were so in this country, where, for many years, a most extensive foreign trade was carried on directly in contravention of the fiscal laws of several other states. The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there he must take the consequences of his own act; but it has never been said that merely selling to a party who means to violate the laws of his own country is a bad contract. If the position were true which is contended for on the part of the defendant, that this appears upon the plea to have been a contract for the express purpose of smuggling the goods, it would follow that it would be a breach of the contract if the goods were not smuggled: but nothing of the kind appears upon the plea; it only states a transaction which occurs about once a week in Paris; the plaintiff sold the goods, the defendant might smuggle them *if he liked, or he might change his mind the next day: it does not at all import a contract of which the smuggling was an essential part. I think, therefore, the plea is no answer to the action.

[*314]

BOLLAND, B. :

I am of the same opinion. The position advanced by *Mr. Mansel* was taken in *Biggs v. Lawrence*, and is fully answered in the judgment of Lord KENYON and Mr. Justice LAWRENCE. I think the distinction pointed out by the LORD CHIEF BARON, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one.

ALDERSON, B. :

I am of the same opinion. If the plea disclosed circumstances from which it followed that permitting the plaintiff to recover

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would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although he may intend to commit an illegal act, is no breach of the law.

GURNEY, B. concurred.

Judgment for the plaintiff.

1835.

EARDLEY v. STEER.

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(2 Cr. M. & R. 327—330; S. C. 5 Tyr. 1071; 4 L. J. (N. S.) Ex. 293;
4 Dowl. P. C. 423.)

A cause and all matters in difference were referred, costs to abide the event of the award. The defendant had a cross demand for a larger amount than the plaintiff claimed in the action. The arbitrators awarded that the action should cease and be no farther prosecuted; that, on the balance of accounts, 661*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant. The Court refused to set aside the award on the ground that it did not sufficiently determine the action.

THIS cause and all matters in difference between the parties were referred to two arbitrators, the costs of the cause, and of the reference and award, to abide the event of the award: the submission reciting that this action was pending between the parties, and that the defendant had a cross demand against the plaintiff for a sum of money exceeding the plaintiff's claim. The action had only proceeded as far as appearance. The arbitrators awarded "that the action should cease, and be no further prosecuted; and that, on the balance of accounts exhibited to them, there was due from the plaintiff to the defendant the sum of 661*l.*, and they awarded that the plaintiff should pay the said sum to the defendant." In Easter Term *Erle* obtained a rule *nisi* to set aside the award, on the ground, amongst others, that it did not finally determine the action; and relied on *In re Leeming and Fearnley* (1), where, on a reference of a replevin suit, the costs to abide the event, an award that the plaintiff should pay *the defendant a sum of 6*l.* due for rent, and that the action should be no further prosecuted, was held not to be sufficiently final.

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(1) 39 R. R. 516 (5 B. & Ad. 403; 2 Nev. & M. 232).

Sir W. W. Follett and Newman now shewed cause :

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This case is distinguishable from *In re Leeming and Fearnley*. That was decided on the supposition that the costs were to abide the event of the action ; here, by the express terms of the submission, they are to abide the event of the award.

(PARKE, B. : That must mean the event of the action as determined by the award.)

The award does determine the action as far as it was possible under the circumstances. There had been no plea ; all, therefore, that the arbitrators could do as to the action was to direct it to be discontinued : they could not award a verdict either way, because there were no issues for them to determine. Where a suit in equity was referred, and the arbitrator directed that the bill should be dismissed, and all proceedings therein should cease and utterly determine, that was held a sufficiently final determination of the suit : *Pearse v. Pearse* (1). Moreover, the arbitrators, having investigated the accounts, award a balance to be paid by the plaintiff to the defendant. That shews that the event was decided in his favour.

Erle and J. B. Greenwood, contra :

In re Leeming and Fearnley is precisely in point in favour of this application. The arbitrators have in effect awarded nothing more than a *stet processus* ; there is no determination of the cause one way or the other. They were bound to have decided which party should pay the costs. As to the award of the 661*l.* to the defendant, it does not appear but that that sum was due in respect of some merely equitable claim, *which could not have been enforced by set-off in the action at law. *Pearse v. Pearse* is distinguishable ; the dismissal of a bill is a determination of the suit.

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(PARKE, B. : Perhaps it would have been more correct to say that the plaintiff had no cause of action ; but what the arbitrators

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have stated is tantamount to saying that the suit is determined in favour of the defendant.)

There is no adjudication to the same effect as, if the action had gone on, would have been a determination of it in favour of the defendant. *Thornton v. Hornby* (1), and *Norris v. Daniel* (2), the former of which was decided before, and the other after *In re Leeming and Fearnley*, are additional authorities against the sufficiency of this award.

PARKE, B. :

I am of opinion that this rule ought to be discharged. The principal objection to the award is, that it is not final, inasmuch as it does not sufficiently decide the cause referred. That objection was mainly rested on the authority of the cases of *In re Leeming and Fearnley*, and *Norris v. Daniel*. As to the former, I think it may be collected from the report that there were some pleadings on the record which rendered it essential to the determination of the suit that there should be an express adjudication upon it, because the action might be maintainable although the landlord was entitled to receive the rent; and the judgment of the Court may have been formed on that ground. Here there seems sufficient on the face of the award to enable us to say that the suit is definitively determined in favour of the defendant. The arbitrators had not only to determine the suit, but to pronounce who was the successful party, in whose favour the balance was to be awarded; and this they have done in effect, by the clause which directs that the plaintiff shall pay the sum of money therein mentioned to the defendant. It is said they have not shewn who is to pay the costs of the action; that depends on the question whether they have sufficiently determined the event, since the costs are to follow the event; and I think we may reasonably intend that they meant to determine the event in favour of the defendant. I think, also, that it sufficiently appears, from the recitals of the submission, that all the matters in dispute were of a legal nature: they were supported by evidence on both

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(1) 8 Bing. 13; 1 Moore & Scott,
48.

(2) 38 R. R. 330 (10 Bing. 507;
4 Moore & Scott, 383).

sides, and I see nothing from which to infer that there was any demand of an equitable nature existing between the parties. The more correct form would undoubtedly have been to state that the plaintiff had no legal cause of action; but it seems to me that the arbitrators have in effect said, that the suit shall be no further prosecuted because the plaintiff has no cause of action. At all events there is doubt enough on the point to prevent us from setting aside the award; if the defendant should apply to enforce it by attachment, perhaps we may decline to interfere, as the Court did under similar circumstances in *Thornton v. Hornby*.

The rest of the Court concurred: and the other objections having also been disposed of in favour of the defendant, the rule was

Discharged with costs.

REX v. ROBINSON (1).

(2 Cr. M. & R. 334—337; S. C. 1 Gale, 209; 5 Tyr. 1095; 4 Dowl. P. C. 447.)

Under a writ of extent for penalties under the Excise laws, the sheriff levied goods of the defendant of the value of 824*l.* A negotiation took place; the sheriff remained in possession, and ultimately the Crown accepted 500*l.* in satisfaction of the penalties, which amounted to 1,000*l.*: Held, that the sheriff was entitled to poundage only on 500*l.*

TANCRED had obtained a rule calling upon the sheriff of Staffordshire, or his under-sheriff, to pay over into the hands of the collector of excise for the district, for the use of the Crown, the sum of 472*l.* 10*s.*, being the balance of a sum of 500*l.* levied on the defendant's goods under an extent, after deducting the sum of 27*l.* 10*s.* for the sheriff's poundage thereon. The facts, as admitted between the parties, were, that judgment having been obtained for the Crown against the defendant for the sum of 7,000*l.*, to secure penalties amounting to 1,000*l.*, under the Excise laws, a writ of extent, indorsed to levy 1,000*l.*, was issued to the sheriff of Staffordshire, under which he seized the defendant's goods. They were appraised at the sum of 824*l.* The

(1) Followed by Court of Appeal in *Mortimore v. Cragg* (1878) 3 C. P. Div. 216, 47 L. J. C. P. 348.—R. C.

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sheriff continued in possession about seven weeks after the seizure, in consequence of a treaty being commenced between the defendant and the Excise for a compromise. The Excise ultimately agreed to take 500*l.* in satisfaction of the penalties. The question now was, whether the sheriff was entitled to poundage only on this sum of 500*l.*, or on 824*l.*, the whole value of the goods taken.

Jervis shewed cause :

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The sheriff is entitled to poundage on the whole amount of the goods levied. The question depends on the construction to be put upon the statute *8 Geo. I. c. 15, s. 3, which first gave the sheriff poundage on extents, and which enacts, that sheriffs levying debts due to the Crown shall, “for their care, pains, and charges, and for their encouragement therein,” have an allowance upon their accounts, according to the several scales therein set forth, on the sums “so by them levied and collected.” These last words are strongly in favour of the sheriff’s claim ; and the statute being expressly “for their encouragement,” ought to receive a liberal construction. There are no cases bearing directly on the present question, but several may be referred to as containing analogies and *dicta* favourable to the sheriff. In *Rex v. Jetherell* (1), he was held entitled to poundage, in the case of an extent in aid, on the whole debt paid over by him to the prosecutor, although he went out of office before a *venditioni exponas* could have issued ; the money having been received after the seizure from the assignees of the debtor, who had become bankrupt. The Court said it was clearly levied and collected within the meaning of the statute. So, in *Norton’s* case (2), the receipt of money from the Crown debtor by the under-sheriff, by the discharge of his own debt, was held a good levy under an extent, so as to entitle him to poundage. That is a stronger case than the present, for there was there no seizure at all.

(PARKE, B.: No doubt 500*l.* was levied here ; the cases you have cited only go to that extent.)

(1) Parker, 177.

(2) Lane, 74.

In *Rex v. Burrell* (1), the Court were clearly of opinion that the sheriff was entitled to retain his poundage on a *levari facias*, where the defendant had obtained an order for time to plead, and to have restitution of the value of the levy on giving security. In *Alchin v. Wells* (2), which was decided on the 29 Eliz. c. 4, (which contains similar words with the 3 Geo. I.), the sheriff was held entitled to poundage, although the parties compromised *before he sold any of the goods.

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(PARKE, B.: The defendant might have given security to pay the whole debt at some other time.)

That does not appear from the report.

(ALDERSON, B.: It seems so to be inferred from *Sir Vicary Gibbs's* argument.)

Bullen v. Ansley (3), and *Rawstorne v. Wilkinson* (4), are also authorities to shew, that wherever the sheriff has regularly levied, he is entitled to poundage, even though the extent be set aside for some other irregularity. The term "levy" does not necessarily import a sale; nor does the extent of itself authorize a sale, but only the writ of *renditioni exponas*.

Tancred, in support of the rule, was stopped by the Court.

PARKE, B.:

The authorities cited go thus far—that the sheriff is entitled to poundage on all the amount obtained under the compulsion of the process; but there is no case which goes to the extent of saying, that, with respect to Crown process, poundage is to be paid on more than came to the hands of the Crown by means of the process; and the only case on civil process which seems to bear that construction is that of *Alchin v. Wells*; but when it is looked at more precisely, it certainly does not go to the extent *Mr. Jervis* contends for: all that the Court decided was, that after such a compromise as took place in that case, they would

(1) Bunb. 305.

(3) 9 R. R. 810 (6 Esp. 111).

(2) 2 R. R. 641 (3 T. R. 470).

(4) 16 R. R. 455 (4 M. & S. 256).

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not allow the private arrangement of the parties to defeat the sheriff of his poundage. There is no other case even apparently deciding that he is entitled to poundage on a greater amount than is actually obtained under the compulsion of the writ.

ALDERSON, B. :

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The very principle on which the sheriff is entitled to poundage at all, shews that he is not entitled *to more than on the sum actually received. What the Crown actually obtains, although not under the direct compulsion of the process, is considered as being in fact the amount levied by the hands of the sheriff. If, therefore, the amount received by the Crown is to be taken as the criterion for one purpose, it must be so also for another.

Rule absolute.

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(2 Cr. M. & R. 337 ; S. C. 1 Gale, 171 ; 5 Tyr. 955.)

If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is part payment, so as to prevent the operation of the Statute of Limitations.

ASSUMPSIT by indorsee against indorser of a bill of exchange. Plea, *actio non accrevit infra sex annos*, and issue thereon. At the trial before Lord Denman, Ch. J., at the last Surrey Assizes, the plaintiff had a verdict, the learned Judge ruling that the delivery of certain hats by the defendant to the plaintiff amounted, under the circumstances, to part payment of the bill, (which was above six years old) so as to take the case out of the operation of the Statute of Limitations. *Platt* having subsequently obtained a rule *nisi* for a new trial, *Comyn* now appeared to shew cause ; but it appearing from the report of the learned Judge, that there was an agreement between the plaintiff and defendant, at the time of the transfer of the bill, that the defendant should supply the plaintiff and his family with hats till he could pay it, and that the hats " should be paid on account," *Platt* admitted that he could not support his rule ;

(1) Followed in *Hooper v. Stephens* (K. B. 1835) 4 Ad. & El. 72.—R. C.

ALDERSON, B., observing :

Here was an agreement to take goods in part payment ; when they were taken on that agreement, it was part payment, and was a continuation of the old promise, so as to bring the case within the exception in Lord Tenterden's Act.

Rule discharged (1).

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THORP v. COLE AND OTHERS.

(2 Cr. M. & R. 367—384 ; S. C. 5 Tyr. 1047 ; 5 L. J. (N. S.) Ex. 24.)

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An agreement of submission recited that a rate had been made and allowed for the relief of the poor of the parish of H. ; and that the plaintiff, a parishioner, was rated for several messuages, &c. in aid of such rate ; and that the plaintiff, conceiving himself to be overrated, had given notice to the defendants, the churchwardens and overseers of the parish, of his intention to appeal against the rate at the next General Sessions of the peace for the county ; and that the defendants did intend to defend the same ; but that, in consequence of the parties thereto agreeing to leave the examination of the rate and all matters in dispute between them as stated in the said notices, to arbitration, no appeal was entered against the rate as by law required ; and that the parties, in order to put an end to all further expense, and to prevent litigation respecting such poor's rate, and in order to settle and ascertain the subject of the said poor's rate, and the equality or inequality thereof, so far as related to the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the same matters in difference between the parties thereto to arbitration. And it was then stated that the churchwardens and overseers (so far as they lawfully might) and the plaintiff agreed to refer the matter to arbitration, and that the award should be made a rule of the Court of K. B. The arbitrators awarded that the defendants should pay unto T. E. F., attorney for the plaintiff, 16*l.* 12*s.*—his bill already delivered, and the amount of the costs of the said T. E. F. attending that arbitration, and of the procuring the signatures of his client and the other parties to the said enlargement of time ; and they further directed that the defendants should deduct from the amount charged upon the plaintiff in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid by him since the then scheme had come into operation. To a declaration on the above award, the defendants, after setting out the submission and award at full length, pleaded as follows : " And the defendants in fact say, that the award is bad and void in law, and this they are ready to verify."

On demurrer to this plea, held that it was good in point of form and substance.

Held, also (PARKE, B., *dissentiente*), that the submission and award were bad, inasmuch as the main object of the reference, namely, the

(1) Cf. *Williams v. Griffiths*, p. 685, *ante* (2 Cr. M. & R. 45).

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rate, was not by law capable of being referred to the decision of an arbitrator; that the costs incurred were merely incidental to the determination of the former question; and that the consideration for the submission therefore wholly failed.

Held, also, by Lord ABINGER, C. B., that the award was bad, in directing the churchwardens and overseers to return and refund to the plaintiff 10s. on each rate made since the new scheme had come into operation, as that was not binding upon them, inasmuch as they could not by law do so, and there was no power to make them obey the award in this respect.

Held, by PARKE, B., that, notwithstanding the reference of the rate was not binding on the churchwardens and overseers, the submission and award were still valid as to the other matters in difference referred to the arbitrators.

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ASSUMPSIT. The declaration stated, that whereas heretofore, to wit, on the 15th April, 1834, by a certain *agreement then made and entered into between the defendants, therein described as the churchwardens and overseers of the poor of the parish of Holywell with Needingworth, in the county of Huntingdon, of the one part, and the plaintiff and Edward Thorp of the other part: after reciting, that, on or about the 20th day of January then last past, a rate was made and allowed for the relief of the poor of the above-named parish; and that the said plaintiff and Edward Thorp were respectively rated for several messuages, cottages, lands, pastures, closes, and garden grounds there, in aid of the said rate; and that the said plaintiff and Edward Thorp, conceiving themselves to be overrated for the said property, and much more in proportion than several other parishioners named in their respective notices of appeal thereafter mentioned for their messuages, lands, and hereditaments there, and conceiving the said rate in many other respects to be unjust, unfair, and partial, did, on the 26th March then last, severally give a notice to the defendants, the above-named churchwardens and overseers, of their respective intentions to appeal at the next General Quarter Sessions of the peace for the county of Huntingdon against the said rate or assessment, and alleging in their respective notices certain specified grievances and grounds of complaint: and that the defendants, the said churchwardens and overseers, believing the said rate to be a fair and equal one, did intend to defend the same, but, in consequence of the said parties thereto agreeing to leave the examination of the said rate, and all matters in dispute between them as stated in the said notices,

to arbitration, as thereafter mentioned, no appeal was entered with the clerk of the peace for the said county against the said rate, as by law was required; and that the said parties, in order to put an end to all further expense, and to prevent litigation respecting such poor's rate, and in order to settle and ascertain the subject of the said poor's rate, and the equality or inequality thereof, so far as the *same related to the charges therein made on the said plaintiff and the said Edward Thorp respectively, as compared with the rate made on the property occupied by Simon Cole, Samuel Thorp, Richard Daintree, Joseph Crosen, and the several other persons named in the said notices of appeal, had agreed and did thereby agree to leave the same matters in difference between the said parties thereto as stated in the said notices of appeal, and all things relating thereto, to the order, arbitrament, and final award of William Abbott, Robert Daintree, and Thomas Bowyer, as thereafter was mentioned: it was by the said agreement witnessed, that the said defendants, as far as they lawfully might or could as such churchwardens and overseers, did thereby, for themselves and their successors, and they the said plaintiff and Edward Thorp did thereby, for themselves severally and respectively and for their several and respective heirs, executors, and administrators, mutually promise and agree to and with each other, that they the defendants, the said churchwardens and overseers, and the said plaintiff and Edward Thorp, and each and every of them, should and would from time to time and at all times thereafter obey, abide by, perform, fulfil, and keep the award, order, final end, and determination of the said William Abbott, Robert Daintree, and Thomas Bowyer, or any two of them, elected and named as aforesaid by the said parties in difference to award, order, and determine of and concerning the above matters in difference, and of and concerning all and every the costs, charges, and expenses of the said agreement and of the counter-part thereof, and of the said notices of appeal, and of the said churchwardens and overseers in consequence of such notices of appeal, and of their preparations to resist such appeal and support the said rate, and of all and every matters relating thereto respectively; so that the said arbitrators, or any two of

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them, should make and publish their award, order, or determination, of *and concerning the premises in writing under their hands ready to be delivered to the said parties, or to either of them requiring the same, on or before the 5th day of May then next ensuing. And the said parties thereto further agreed, that the costs of the said arbitration, and award to be made in pursuance thereof, should be in the discretion of the said arbitrators, or such two of them as might give in their award concerning the same, who should award by whom, to whom, and in what manner the same should be paid. And it was thereby further agreed, by and between all the said parties to that agreement, that that agreement and submission to arbitration should be made a rule of his Majesty's Court of King's Bench at Westminster, to the end that the said parties in difference should be finally concluded by the said arbitration by the said agreement intended, pursuant to the statute in such case made and provided. The declaration then alleged mutual promises for the performance of the agreement, and then averred, that the said William Abbott, Robert Daintree, and Thomas Bowyer, did afterwards, to wit, on the day and year first aforesaid, take upon themselves the burthen of the said award and arbitrament; and that afterwards, and before the 5th of May, 1834, it was further mutually agreed between the defendants and the plaintiff and the said Edward Thorp, that the time for the said arbitrators making their said award should be enlarged until the 5th of June, 1834. And the plaintiff in fact says, that the said William Abbott, Robert Daintree, and Thomas Bowyer, did afterwards, to wit, on the 5th of May, 1834, by writing under their hands, enlarge the time for making their award unto the said 5th of June, 1834. And they did afterwards, and before the said 5th of June, 1834, to wit, on the 14th of May, 1834, make and publish their award in writing under their hands, of and concerning the premises and matters to them referred as aforesaid, ready to be delivered to the said parties, or either of them *requiring the same: whereby they the said William Abbott, Robert Daintree, and Thomas Bowyer, did award, adjudge, and declare that the defendants should, on delivery of that award, well and truly pay or cause to be paid unto Thomas Escoline Fisher, attorney of the plaintiff and

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Edward Thorp, the sum of 16*l.* 12*s.*, his bill already delivered, and the amount of the costs and charges of the said T. E. Fisher attending that arbitration, and of the procuring the signatures of his said clients and the other parties to the said enlargement of time; and they did thereby further direct, that the defendants should deduct from the amount charged upon the plaintiff in all future rates the sum of 10*s.*, and should return to him (the plaintiff) the sum of 10*s.* for every rate granted and paid by him (the plaintiff) since the then scheme had been in operation: of which said award the defendants afterwards, to wit, on &c. had notice, and the said award was then delivered to them. Yet the defendants, although often requested so to do, have not, nor hath either of them, as yet paid to the said T. E. Fisher the said sum of 16*l.* 12*s.*, his said bill delivered, or any part thereof; and although the costs and charges of the said T. E. Fisher attending the said arbitration, and of procuring the signatures of his said clients and the other parties to the said enlargement of time amounted to a large sum, to wit, 4*l.* 18*s.* 6*d.*, whereof the defendants afterwards, and after the making and delivery of the said award, to wit, on &c., had notice, and were thereupon requested by the said T. E. Fisher to pay him the same; yet they did not nor would then, or at any other time, pay him the same or any part thereof, but they so to do have, and each of them hath, hitherto wholly neglected and refused. And the plaintiff in fact further saith, that, although, before the making and entering into the said first mentioned agreement, divers, to wit, one hundred rates had been granted and paid by the plaintiff since the scheme existing at the time of the making the said award had been *in operation, so that, under and by virtue of the said award, the defendants became liable to return and pay to the plaintiff a large sum, to wit, 50*l.*, being the sum of 10*s.* for every rate so granted and paid as aforesaid; of which premises the defendants afterwards and after the making and delivery of the said award, to wit, on &c., had notice; yet the defendants have not, nor hath either of them, as yet returned or paid to the plaintiff the said sum of 50*l.* or any part thereof, but have and each of them hath hitherto wholly neglected and refused, and still neglect and refuse so to do, &c.

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The defendants pleaded, setting out the agreement and the award at full length. The agreement was in the terms stated in the declaration; the award recited the agreement, and, after awarding the sum of 16*l.* 12*s.* and the costs of the said T. E. Fisher attending the arbitration, to be paid to him, directed that the defendants should pay to Messrs. Allpress and Lawrence the sum of 20*l.* 4*s.* for their costs attending the reference, and the sum of 57*l.* 19*s.* to them for the charges of the arbitrators. The defendants were then ordered to deduct the sum of 10*s.* for the future rates, and refund it for the past. The award went on to direct, that, as a dispute was made with regard to the quantity of the lake occupied by the said William Thorp, the quantity thereof should be ascertained by the parish, and the rate altered accordingly, agreeable to the price per acre as set against the said lake by them (the arbitrators) in schedule A. A deduction of 5*s.* a rate was ordered in favour of E. Thorp. The plea concluded as follows: "And the defendants in fact say that the award is bad and void in law; and this they are ready to verify." Demurrer, alleging for cause, that the award is good and sufficient in law, and that the plea attempted to put in issue to be tried by a jury matter of law, namely, the sufficiency or insufficiency of the award, and that the defendants ought to have demurred, instead of pleading the insufficiency of the award.

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Erle, in support of the demurrer, first contended that the plea was informally concluded; but he was directed by the Court to consider whether the declaration could be supported. It must be conceded that the parish officers have no power to submit the rate to arbitration, and, therefore, so far as the award proceeds to make any alteration therein, it is invalid, and, with reference to some portion of it, it exceeds the submission; yet so much of as directs the defendants to pay the costs of preparing for the appeal, and the expenses of the arbitration, is free from objection. It will perhaps be contended, that the reference of the rate formed the material part of the reference, and therefore, as that fails, the residue must also fail. But the arbitration with regard to this part of the

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submission is not wholly inoperative and useless. The arbitrators were put into the situation of the justices at the Quarter Sessions, who had power to decide upon the validity of the rate. As it must be taken that the parties were aware that the rate itself was not the subject-matter of an arbitration, the Court can see a distinct purpose for the reference, which is not to be objected to; which was to obtain the judgment of competent persons upon the proper scheme or mode of laying the rate in future. All that the award amounts to, therefore, is, an opinion upon the scheme of rating, and not a judgment upon the particular rate itself. There is, accordingly, a good consideration for the overseers entering into such a reference. Besides, it appears that the parties had incurred expenses in preparing for the appeal, and the defendants induced the plaintiff to abandon the appeal in consideration of their submitting that certain arbitrators shall settle the rate,—which it is said, and may be conceded for the purpose of the present argument, is a nugatory act,—and shall also determine who is to pay those expenses. The defendants derive a benefit from this contract, for the appeal is abandoned, *and it might have been awarded that their costs should be paid. The submission of this matter, and the award upon it, is consequently good.

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Kelly, contra :

It is submitted that the award is wholly void. When several matters are submitted to arbitration, and the obligation on the one party depends upon the promise by the other to abide by the award on all the matters, and it turns out that the submission of one of them is void or illegal, neither party can enforce the award. Here, the consideration for the defendants' agreement was, that there should be an award upon all the matters contained in the submission; it is so alleged in the declaration, and the plaintiff must have so proved his case. If that be so, and any part of the whole consideration be proved to be void in law, whether it be shewn by evidence or appear on demurrer, it will fail altogether. In this case a material part of the consideration, namely, the reference of the rate, is void, and cannot be established; and the award is therefore wholly

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void. The distinction which prevails is this—where the consideration is entire, but the promise is to do several things, the contract is binding, though some of them cannot be performed; but, if the consideration consists of several distinct matters, and one of them fail, it renders the whole contract invalid. The case of *Biddell v. Dorse* (1) is a decisive authority for the defendants. It was there said by ABBOTT, Ch. J.: “If the submission fail as to one important part, we think it cannot stand as to the residue.” As to the costs of preparing for the appeal, it is evident that they are only incidental to the main question of the rate, and are like the costs of a cause which is referred. In the present case, if the appeal had been heard before the Court of Quarter Sessions, that Court would have adjudicated *upon those costs as incidental to the appeal, and necessarily involved in the consideration of it. They cannot, therefore, be treated as forming a distinct subject-matter of the reference, sufficient to raise an obligation to perform the award. There are some minor objections apparent on the award. It is not complete; for there is no award regarding the counterpart of the agreement. Besides, it is uncertain; for it directs a sum of 16*l.* 12*s.* to be paid to Fisher, but does not state on what account the money is to be paid.

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Erle, in reply :

The Court will infer that the sum of 16*l.* 12*s.* is the amount of the expenses incurred by Fisher in preparing for the appeal; for every intendment is to be made in favour of awards. With respect to the general question, the case of *Biddell v. Dorse* has no applicability to the present case. There, the object and intention of the parties was, to put an end to a suit in equity; and that object must fail unless all the parties to the suit were bound by the submission. Consequently, where some of the parties to the suit were not bound by the submission, being infants and married women, that object wholly failed. In the present case, however, the intention of the parties can be effectuated in part, if not altogether. Much of the costs which are the subject of

(1) 28 R. R. 576 (6 B. & C. 266; 9 Dowl. & Ry. 415).

the reference, were not recoverable by either party; and the object was to refer those preparatory expenses, in order that the arbitrators might determine who ought to bear them.

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(PARKE, B.: There is one part of the award which seems not to be final, supposing the reference to be on the whole rate. The arbitrators find that there is a dispute about the quantity of the lake occupied by the plaintiff, but they have not determined it; they have only given the price per acre at which it is to be rated: the quantity of the land is to be ascertained by the parish.)

It does not appear that *that was a matter in dispute at the time of the submission, and there is no allegation in the plea that it was so; and therefore the arbitrators were not bound to award upon it.

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Cur. adv. vult.

There being a difference of opinion amongst the Judges, they now delivered their judgments *seriatim*.

BOLLAND, B.:

The question in this case is raised by a demurrer to the plea. The action was brought by the plaintiff upon an award, and it will be necessary for me to refer fully to the pleadings. (The learned BARON here stated the declaration.)

The defendants in their plea admitted the submission and award, and set both out fully, and concluded—"And the defendants in fact say, that the award is bad and void in law, and this they are ready to verify."

It does not appear to me that the plea is objectionable either in substance or form; but then the question which the Court has to decide is, whether the award can be supported; and I am of opinion that it cannot, as much the greater part of the subject-matters referred are such as the parties could not, by any agreement between themselves, without the intervention and authority of the justices in Quarter Sessions, submit to the decision of arbitrators. I am aware that appeals against poor's rates, where the matters in dispute can be more satisfactorily

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discussed and inquired into before a private tribunal, are frequently, by the consent of the parties litigant, and with the sanction of the justices after such appeals are entered, referred to a competent person or persons, to make his or their report to the Court, to give it information and guide its judgment; but the magistrates only can decide between the parties: *Rex v. Justices of Southampton* (1), *and *Rex v. Natland* (2). In the case before the Court, the plaintiff appealed against the rate, not on the ground solely of being overrated for the property in his occupation, with reference only to the value of that property; but his further complaint was, that he was overrated with respect to and in comparison with the sums at which other persons named in his notice of appeal were assessed. Those persons were no parties to the reference; the award of the arbitrators could not be binding upon them; and, as I am of opinion that the arbitrament could not in law be made available in favour of the plaintiff, either as against the churchwardens and overseers, the defendants, the parishioners then being, or future parishioners, or the successors in office of the defendants, the award cannot in any part be supported, but is in my judgment altogether void. There is no sufficient consideration for the promise alleged in the declaration. Nothing appears to shew a legal obligation to abide by and perform the award. Such legal obligation must arise out of a valid and competent submission to the authority of the arbitrators, and that authority does not exist here. Upon this point the case of *Biddell v. Douse* (3) is a well considered and decisive authority. For the above reasons I am of opinion, that the defendants are entitled to judgment.

PARKE, B. :

The plea is good in point of form and substance. It admits the submission and award, so far as stated in the declaration, but sets out both at full length, and thereby raises a question, whether the award be valid in law. The conclusion which is objected to, as referring matter of law to the jury, is either

(1) Caldecott, 30.

(2) Burr. S. C. 793.

(3) 28 R. R. 574 (6 B. & C. 255;

9 Dowl. & Ry. 405).

the statement of an inference of law from the premises, as if it had said, “and so the defendants say, that the said award is bad, and void in law;” or it may be rejected as surplusage.

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The question then to be decided is, whether the award, compared with the submission, be void altogether.

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The submission is of three things :

First, The examination of the rate, and all matters in dispute, as stated in the notices of appeal; the object being to settle and ascertain the subject of the poor's rate, and the equality or inequality thereof, so far as relates to the charges on William Thorp and Edward Thorp respectively, compared with other individuals named in the notices of appeal; secondly, the expenses on both sides, of the agreement, counterpart, and notices of appeal, and preparations to resist the same; and there is the usual clause—so that the arbitrators should make their award and determination of and concerning the premises, which include both these matters, at a certain time:—and, thirdly, there is an agreement, that the costs of the arbitration and award should be in the discretion of the arbitrators.

It was argued by the learned counsel for the defendants, that the whole award was void, because the churchwardens and overseers had no power to bind themselves, or the magistrates at Quarter Sessions, existing or future, by such a submission; and that the submission and award were in this respect wholly nugatory; and, the other questions being merely ancillary to this, the whole award was void.

On the part of the plaintiff it was not disputed that neither the churchwardens and overseers, nor the magistrates were bound in this respect by the award; but it was nevertheless insisted, that the award was good as to the other matters in difference; that, in construing contracts, the parties to them must be assumed to be cognisant of the law; that no binding settlement of the rate could be made by the arbitrators; and that they must, therefore, be intended to have submitted that question *only so far as by law it could be; and that the special manner in which the defendants have bound themselves, is a confirmation of that view of the case. The defendants therefore must be taken to have agreed, in consideration of the

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plaintiff and Edward Thorp agreeing to withdraw their notices of appeal, and jointly employing the arbitrators to make a valuation of the property in the rate, so far as related to the comparative amount assessed on the plaintiff and the other persons named, to abide by their award on the question as to the costs of preparing to litigate the rate at the Quarter Sessions, and the expenses of the agreement to refer, and reference; and it is contended that such a contract is good in law.

It appears to me that this view of the case is right, and that the agreement of submission is valid and binding, for the reasons thus stated in the argument on behalf of the plaintiff.

There is no doubt that, if the parties had both agreed to withdraw the notices of appeal, and to abandon all objection to the validity of the rate, they might also have agreed to leave to arbitration the question which of the parties should pay the expenses of the preparations of the appeal; and if this be a fit subject of reference, can such a reference be rendered invalid, by uniting with it an agreement that the arbitrators are to make a valuation for their information and guidance? I should say it cannot.

The case of *Biddell v. Douse* is distinguishable. There some parties to the reference were not bound at all; and unless they were, there was no mutuality. Here, they were bound on both sides; both have agreed: and the only question is, what is the meaning of the contract between them: and I must say, that I think the reasonable and proper construction of the contract is, not that the arbitrators shall do what both parties must know to be by law impossible, but that which they can do; that is, merely make *a valuation as a guide to the parties for their future conduct. This is the only doubtful part of the contract, for the residue is clear, and admitted on both sides, viz. that they shall determine and decide the other questions.

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I am of opinion, therefore, that the award is not void on this ground. In the course of the argument, however, two other objections were suggested at the Bar or from the Court, which at the time appeared to me to be of considerable weight; but, on subsequent reflection, I do not think they ought to prevail.

First. It was stated, that the submission is conditional, with

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an *ita quod* so far as relates to the settlement of the rate, and to the expenses of the agreement and notices of appeal; and, admitting that the construction which I have put on the submission was correct, and that the churchwardens and overseers are not and could not be legally bound by the settlement of the rate by the arbitrators; and that the award is, therefore, as to its legal consequences in this respect, void, yet it is said that the final settlement of the rate, in respect of the proportions mentioned, by a complete and perfect valuation, is a matter which the parties have stipulated for, and made their submission to the award in every respect conditional on such a valuation being in fact made, and the other questions submitted finally determined. And it is said, that such complete and perfect valuation has not been made; for it appears by the award, that they have left the quantity of the lake occupied by the plaintiff, on which the amount of the rate in part depends, unsettled.

But I think that the construction of this part of the award, which is set out in the plea, unexplained by any averment on the record, is, that the whole lake is occupied by the plaintiff, and the only matter deferred is its measurement, which is a mere ministerial act, and which, even where a matter is referred to be finally decided by arbitrators, and not simply a valuation to be made, may be *delegated to another: *Winch and Saunders'* case (1). The award, therefore, appears to me not to be void in this respect.

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A second objection was, that the award is void, as the amount of the costs to be paid by the defendants, on account of the plaintiff's expenses of notices of appeal, as well as of the agreement or counterpart, is unascertained. The award directs the defendants to pay to T. E. Fisher, the attorney of the plaintiff, and Edward Thorp, the sum of 16*l.* 12*s.*, his bill already delivered, and also Fisher's charges attending the arbitration, and of procuring the signatures of his clients, and the other parties to the enlargement of time, which latter charges are not ascertained. As there is a stipulation that the submission is to be made a rule of the Court of King's Bench, the amount of

(1) 2 Rolle's Rep. 214.

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these last costs may be taxed : and therefore it is no objection that they are not settled by the arbitrators themselves. And as to the bill of Fisher for 16*l.* 12*s.*, that must be considered as being on account of costs relating to the notices of appeal ; because, as the award is made *de premissis*, and the context shews the costs of the agreement and of the reference not to be included in the 16*l.* 12*s.*, the Court ought to intend that this sum is for one of the matters submitted, and therefore is for the costs of the notices, according to the rule laid down in *Rose v. Spark* (1), that these words have the effect of applying the general words of the award to the particular things submitted. And though the amount of the plaintiff's share of that sum is unascertained, yet, as the 16*l.* 12*s.* is stated to be for a bill already delivered, the sum due from the plaintiff to his attorney might easily be ascertained by reference to the bill ; and therefore the award is sufficiently certain in this respect.

I am therefore of opinion that the plaintiff is entitled to judgment.

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LORD ABINGER, C. B. :

I am of opinion that in this case the plea is good, and that the award and submission are bad. I shall give the grounds for my opinion very shortly. The submission to arbitration recites, that the plaintiff, conceiving himself to be over-rated by means of the rate made upon him, had given notice of appeal, specifying in such notice the grievances complained of. The parties entered into an arrangement on this occasion. Now, I do not mean to state, that, if the notice of appeal had been withdrawn upon collateral grounds, and the question of costs had been the only remaining question to be decided between the parties, that question might not have been referred to some arbitrator to ascertain what was the amount of the costs which each party ought to pay ; but, in this case, the agreement of submission to arbitration shews, that the cause of difference was a cause which could not be made the subject of a submission to arbitration, because it recites it to be the amount of the rate, and that it is which these parties propose to refer, and which the churchwardens

(1) *Alleyn*, 51 ; 1 *Saund.* 324.

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and overseers consent to refer so far as in law they can. It appears to me that the costs are merely incidental to the subject-matter in dispute; they arise incidentally out of the general subject-matter of the reference. Now, it can never be supposed that a party intends to bind himself by an arbitration respecting a matter incidental to that which was the real point in dispute, when the latter wholly fails. It has always appeared to me, that a submission to arbitration is in the nature of a contract founded on a consideration of a final and valid determination of all the matters described in the bond of submission, and therefore I have always been of opinion that if the main part of the object of the arbitration fails, either by its being illegal to refer it, or by reason of any other cause of failure, then the whole submission is void. That doctrine is the foundation of the decision which has been referred to, in *Biddell v. *Dowse*. It is very true that that case is not exactly similar to this, but the principle is the same. It was there determined, that as the object of the parties could not be obtained by the reference, by reason that certain infants ought to have been made parties, who could not be so made by law, the object the parties had in view failed, and therefore the whole submission was void. This was distinctly laid down in that case, and that principle is applicable to the present case; the parties here intending, as far as they could, to refer that, which it turned out was not in law capable of a reference, namely, the rate. The costs incidentally arising out of the matter submitted never could have been meant to be made the subject-matter of reference alone. The consideration for the submission therefore fails. If a man refers all matters in difference, and it turns out that they are not properly referred, the submission is a nullity, and he is not bound by the award. On these grounds I think the submission to arbitration is void. I think also that the award itself is bad. It directs that the churchwardens and overseers shall return ten shillings back on each rate, and goes no further: that is clearly not binding upon them; they cannot do it by law, and there is no power to make them obey it at all. The award on this, therefore, is of no avail; and yet this is a material point referred. Then the arbitrators direct that the quantity of the lake

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occupied by the plaintiff should be ascertained by the parish, and the rate altered accordingly. That, I think, might not of itself vitiate an award. But this is a point which is to be ascertained by the parish. Now, what is the meaning of the word "parish?" That is left in doubt. It may mean the churchwardens and overseers; or it may mean that the parishioners themselves are to make the settlement. It seems to me the matter is left so much in doubt, that it cannot entitle the parties to any benefit from the award of the arbitrators. Supposing the parish were disposed to accede to the adjustment *pointed out by the arbitrators, the parties cannot have the benefit of the award, as the parish are no definite persons, and could not set out the quantity of the property occupied by the plaintiff. It is said by my brother PARKE, and undoubtedly if that were so I could go along with him, that he considers that this substantially is only an agreement to refer the matter in dispute to the arbitrators, to make a valuation of the property in the lake on which the rate is to be made, which may be afterwards adopted by the parish officers or not; but the proper mode of making a valuation of a parish is to assess the parishioners equally, and if there be any dispute as to the rate, the Quarter Sessions ought to settle it. It is a common practice to arrest the adjudication at Sessions until the parties have an opportunity of making a new valuation; but the validity of that depends on the Sessions adopting it, and not upon the opinion of an arbitrator. I do not think that this was a subject on which an arbitrator was competent to award. On these grounds it appears to me the award is bad, and that judgment ought to be for the defendants.

Judgment for the defendants.

1836.

*Exchequer
Chamber.*

[1 M. & W.
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The above judgment having been brought on error into the Exchequer Chamber, the case was argued by *Erle* for the plaintiff in error, and by *Kelly* for the defendants; but as the arguments were substantially the same as those urged in the Court below, it is thought unnecessary to report them. *PATTESON, J.*, intimated, in the course of the argument, that the contract might have

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been entered into so as to be legal, as, for instance, if the costs had been left to the decision of the arbitrators, and they had been desired to give their opinion as to the validity of the rate.

LORD DENMAN, Ch. J. :

The difference of opinion which has taken place in the Court of Exchequer has required that we should give this case our deliberate consideration, which we have done. I have felt a wish on my part that *this agreement should be upheld, because in my opinion matters of this nature would be much better decided by persons residing in the neighbourhood, and acquainted with the nature of the property, than by the judgment of any Court. We are by no means of opinion that such an arrangement as this may not be binding, if properly entered into; but we do not think that we can put such a construction upon this agreement as to consider it valid. It cannot be denied that the real question submitted was the validity of the poor rate. Now, that being the consideration for the agreement and the promise of the defendants, it appears that the arbitrators have been empowered to do what is not lawful to be done.

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An attempt was made, with great ingenuity and force, to make out that other matters were properly submitted. One was, the principle on which the future rates should be imposed; the other was the costs incurred in preparing for the appeal.

With regard to the principle on which future rates are to be made, no obligation is entered into at all; with regard to the costs, they are merely accessory to the other matters submitted. In any way of looking at this case, the consideration is untruly stated; if any thing is stated to be referred to the arbitrators, which they had no authority to decide, the consideration is untruly stated. It is not necessary to enter into the examination of the other objections, which are mentioned in the report of the judgment of the Court in Crompton, Meeson, and Roscoe.

We therefore think that this was no binding agreement, and that there was no right of action against the defendants.

Judgment affirmed.

1835.

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Pleas.*(2 Cr. M. & R. 416—421; S. C. 1 Gale, 182; 5 Tyr. 840; 4 L. J. (N. S.)
Ex. 259; 4 Dowl. P. C. 263; at N. P. 1 M. & Rob. 477.)

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Where a verdict has been found with damages in an action of defamation for words imputing felony, the Court will not stay the proceedings, or grant a new trial, on the ground that, since the trial, the plaintiff has been convicted and attainted of the same felony; *à fortiori* where the defendant has been examined as a witness upon the trial of the indictment.

The Court will not interfere upon motion to give that relief to which it is suggested that the parties applying would be entitled under an *audita querelâ*, unless, upon the facts appearing on the affidavit, it is clear that the party would be entitled to such remedy.

Where a defendant is entitled, as against the plaintiff, to be relieved from a verdict obtained against him, the Court will not abstain from interfering on the ground of the lien of the plaintiff's attorney upon the verdict for his costs.

THIS was an action of slander, for words spoken by the defendant, imputing that the plaintiff had feloniously stolen certain bullocks belonging to him, the defendant. Plea, not guilty. At the trial before Patteson, J., at the last Assizes for the county of Cornwall, the plaintiff recovered a verdict with 60s. damages.

In Easter Term last, *Erle* moved for a rule *nisi* for a new trial, or why the proceedings should not be stayed, upon affidavits stating, that, subsequently to the trial of the cause, the plaintiff had been indicted on the prosecution of the defendant at the General Quarter Sessions of the peace for the county of Cornwall, for stealing the bullocks in question; that, on the trial, the defendant was examined as a witness to prove the loss of the bullocks, but that the most material facts were proved by other witnesses; that the plaintiff was thereupon convicted, and sentenced to be transported for life. He contended that the defendant was entitled to bring a writ of *audita querelâ*, and that the Court would, in such a case, interfere summarily upon motion to stay the proceedings, citing *Wicket v. Cremer* (1). The Court granted a rule *nisi*, directing it to be served upon the Attorney-General.

The Crown declined to interfere, but cause was shewn by

(1) 1 Ld. Ray. 439.

Bompas, Serjt., and *Manning*, on behalf of the plaintiff's attorney :

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The Court will not grant this application, unless they are satisfied, not only that an *auditâ querelâ* would lie, but that it would ultimately succeed. That is laid down in 2 Wms. Saunders, 148 a.

(ALDERSON, B.: *The same point also occurred in *Wicket v. Cremer*.) [*417]

An *auditâ querelâ* could not be supported in the present case, because the conviction being obtained upon the testimony of the defendant, the Courts would not allow it to be given in evidence. They will not allow a criminal proceeding to be used in a civil cause where the party himself has been examined as a witness in the criminal proceeding: *Bartlett v. Pickersgill* (1), *Rex v. Boston* (2), *Gibson v. M'Carty* (3). The declaration in the *auditâ querelâ* must state the guilt and the conviction of the party; and if denied by the plea, the guilt must be proved.

(ALDERSON, B.: It would not be necessary to prove the guilt of the plaintiff, but only the fact of the conviction having taken place.)

Still the defendant would obtain the benefit of his own testimony, upon which the conviction was founded; and the proof of the property in the bullocks in question was as material as the felonious taking. If a conviction so obtained were held admissible, it would be a strong inducement to persons to perjure themselves on the trial of prosecutions.

(ALDERSON, B.: In *Blakemore v. Glamorganshire Canal Company* (4), this subject was lately considered by this Court, and the reason why judgments in criminal proceedings were held not admissible in civil proceedings was stated to be, because they were *res inter alios actæ*.)

Secondly, the attainder does not divest the plaintiff's right to the damages. Undoubtedly, all debts due to the felon, and all

(1) Stra. 577.

(3) Ca. temp. Hardw. 311.

(2) 4 East, 572.

(4) 2 Cr. M. & R. 133, 139.

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his choses in action, and his judgments, vest in the Crown on attainder; but the rule is otherwise in the case of what is no debt, but merely unliquidated damages. If there had been a judgment in the present case, it might have vested in the Crown; but although the amount of damages has been brought to a degree of certainty by the verdict of the jury, *yet it must pass *in rem judicatam*, to constitute a debt: *Bullock v. Dodds* (1). That case was decided on the distinction, as to what vested in the Crown on attainder, between debts and choses in action, and cases of tort, where the damages do not vest in the Crown until they have passed *in rem judicatam*. The effect of an attainder on the personal property of a felon was there much considered, but no authority was cited to shew the right of the Crown to damages for personal injuries sustained by the felon; but it is expressly stated, that, in outlawry for felony, the right to damages is not forfeited; and the rights of the parties are the same in attainder for felony as in outlawry. Thirdly, the personal disqualification of the plaintiff cannot now be objected to. When the action is brought by a party who has been attainted of felony, or outlawed for felony, the defendant may plead either in abatement or in bar, if the action is brought for a debt, because the debt is vested in the Crown; but if brought for tort or trespass, the objection can only be pleaded in abatement, in respect of the disability of the person, and not in bar, because the right is not vested in the Crown, but remains in the plaintiff. Being matter in abatement only, it is not sufficient to support an *auditâ querelâ*. The Court will not grant relief upon motion for matter which is the subject of an *auditâ querelâ*, unless the remedy by *auditâ querelâ* be quite clear and undeniable. Here, if an *auditâ querelâ* were brought, many questions upon the law of forfeiture might be raised upon the record, which it would be consistent neither with convenience nor with justice to dispose of in a summary way upon motion: *Bullock v. Dodds*, and the cases there referred to.

Erle and *W. C. Rowe*, in support of the rule:

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It is *immaterial that this conviction was obtained partly on

(1) 20 R. R. 420 (2 B. & Ald. 258).

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the evidence of the defendant. In an *auditâ querelâ*, the pleadings would set out the record of the conviction, and that could only be disputed by the plea of *nul tiel record*; and upon an issue raised by that plea it would only be necessary to produce the record, and no inquiry could be entered into as to the evidence upon which it proceeded. As to the cases of perjury, where the conviction has been held inadmissible in a cause in favour of a witness, upon whose testimony the conviction was obtained, they rest upon a peculiar ground, because there the conviction was sought to be used to disprove the answers on which the perjury was assigned; and, in effect, to use it as evidence of the falsehood of the answers. In this case, it is only proposed to use the record of conviction to prove the fact of the conviction having taken place. Secondly, as to the objection that the plaintiff's interest in the damages does not vest in the Crown, there is no authority for the distinction which has been taken between the right to unliquidated damages, and debts and choses in action. In Hawkins's Pleas of the Crown (1), it is laid down, that "all things whatsoever, which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is entitled to in his own right, and not as executor or administrator to another, are liable to forfeiture." This must be considered in the same light as if judgment had been entered up, as that would follow as a matter of course. Besides, attainder is not only retrospective, but prospective also in its effects, and would, therefore, reach the judgment signed after it: *Bullock v. Dodds*. If the plaintiff's right to execution is gone, his attorney cannot be in a better situation, and the Court will not interfere to assist him: *George v. Elston* (2).

Cur. adr. vult.

The judgment of the COURT was afterwards delivered by—

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BOLLAND, B. :

This was an application to stay all the proceedings in this cause. The action was tried at the last Cornwall Assizes, before

(1) 2 Hawk. P. C. c. 49, s. 18. See (2) 1 Bing. (N. S.) 513; 1 Scott, also Bacon's Abr. Forfeiture, B. 518.

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my brother Patteson. The declaration complained of the defendant having spoken words of the plaintiff, imputing to him the commission of a felony. The defendant pleaded the general issue only; and on the trial the plaintiff had a verdict, with 60*s.* damages.

Subsequently to this trial, the plaintiff has been tried and attainted, upon a charge made against him by the defendant, and at that trial the defendant was examined as one of the witnesses for the prosecution. Upon these facts disclosed by the affidavits, the defendant applied for and obtained the present rule, and the Court directed that it should be served on the Attorney-General. It now appears that the Crown declines to interfere on either side; and the question is, whether the attorney for the plaintiff, on behalf of whom cause has been shewn, is to be deprived of his chance of obtaining the fruits of the verdict, by the present rule being made absolute.

We think that he is in no better situation than his client would be; the lien of the attorney depends on the right of the client to judgment. Where the client is entitled to it, as against the opposite party, the Court permits the attorney to carry on the suit for his own benefit, even where the client declines to do so himself; but where there is no collusion, and the client, either by his own act, or by the act of the law, is deprived of the means of further enforcing his claim against the opposite party, the lien of the attorney is altogether at an end. If, therefore, we were clearly satisfied that the plaintiff in this case was in that situation, it would be proper to grant the present application.

[*421] Now it is said that he is so, because the defendant has a right to sue out a writ of *audita querelâ*, and to deprive *the attorney, by so doing, of the power of taking out execution under the judgment, when signed. And there is no doubt that the Courts have laid it down, that where a defendant is entitled to such redress by writ of *audita querelâ*, they will give relief by motion, in order to prevent the necessity for such a writ. But it is also laid down, that such cases must be clear; for the Court, by granting such summary relief, precludes the party from the chances of the failure of proof when the facts are properly

investigated, and the benefit of the judgment of a court of error on any question of law arising therefrom. It is on this ground, therefore, that we think the Court ought not to grant this application. In the first place, it may be very questionable how far, in the absence of any active interference on the part of the Crown, the defendant will be enabled effectually to pursue his redress by writ of *auditâ querelâ*; and, in the next place, there are several questions relating to the law of forfeiture, ingeniously put by the learned counsel, *Mr. Manning*, in shewing cause, which may well deserve consideration. And lastly, although this Court entertains no doubt, that, for the purpose of proving the fact of the attainder, the record of conviction would be admissible evidence in a writ of *auditâ querelâ*, even though the defendant was a witness in the prosecution on which the plaintiff was convicted; yet we do not think it right, in this case, which is an application to the extraordinary interference of the Court, to grant summary and conclusive relief under such circumstances, and to lend our assistance to a party who has, to a certain extent at least, been a witness in his own cause. Upon the whole, therefore, we think that this rule must be discharged, and the defendant left to his remedy by writ of *auditâ querelâ*.

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Rule discharged.

HUZZEY v. FIELD (1).

(2 Cr. M. & R. 432—445; S. C. 1 Gale, 166; 5 Tyr. 855; 4 L. J. (N. S.) Ex. 239.)

1835.

*Exch. of
Pleas.*

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Where there is an ancient ferry from A. to B., which leads to a public highway, and another constructs a landing-place at C., a short distance from B., and carries passengers over from A. to C., from whence they pass to the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie.

But where there is a river passing by several towns or places, the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other, does not preclude persons

(1) The principal later authorities (1862) 12 C. B. (N. S.) 32, 31 L. J. bearing upon the right in question are *Matthevs v. Peache* (or *R. v. Matthevs*) (1855) 5 El. & Bl. 540, 25 L. J. M. C. 7; *Newton v. Cubitt* (1862) 12 C. B. (N. S.) 32, 31 L. J. C. P. 246; *Hopkins v. Great Northern Ry. Co.* (1877) 2 Q. B. D. 224, 46 L. J. Q. B. 265.—R. C.

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from using the river as a public highway, from or to all the towns or places on its banks which are not in the line leading from one *terminus* of the ferry to the other.

Where the owner of a boat, which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master: Held, that the servant was acting at the time in the course of his master's service and for his master's benefit, and that the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry (1).

ACTION upon the case for the infringement of a ferry. The first count of the declaration stated, that the plaintiff was possessed of a certain ancient ferry, called Burton Ferry, otherwise Pembroke Ferry, across and over a certain branch of a certain haven, called Milford Haven, for the conveying and ferrying over and across the said branch of the said haven, backwards and forwards within the said ferry, all persons, &c., in boats kept for that purpose by the plaintiff; he, the said plaintiff, taking and receiving reasonable freights and ferryages to him of right payable therefore. It then averred that the defendant, intending to deprive him of the profits of his ferry, wrongfully carried and conveyed and ferried, for hire, in certain boats, divers persons, &c., over and across the said branch of the said haven, at and within the said ferry, whereby the plaintiff had been and was greatly injured in the enjoyment of his said ferry. The second count was similar to the first, but calling the ferry an ancient ferry (without giving any name to it) across Milford Haven, and stated as a breach that the defendant had ferried over, &c., at or near to the said last-mentioned ferry. The third was similar to the second, omitting the keeping of boats by the plaintiff. The fourth count stated that the plaintiff was possessed of a certain ancient ferry, called Nayland Ferry, across and over Milford Haven; and alleged that the defendant carried and conveyed passengers over and across the haven, and upon the part of the said haven where the said plaintiff had such ferry, over, upon, within, *and

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(1) See the case cited on this point in judgment of Exchequer Chamber in *Barwick v. English Joint-Stock Bank* (1867) L. R. 2 Ex. 259, 266.—R. C.

across the same. The fifth count called the ferry Pembroke Ferry, and the sixth Burton Ferry. The defendant pleaded not guilty.

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c.
FIELD.

The cause was tried before Parke, B., at the last Summer Assizes for the county of Pembroke, when it appeared that the plaintiff was the lessee, under Sir John Owen, Bart., of a horse and foot ferry, called Pembroke Ferry, across Milford Haven, from a place called Burton to a point on the opposite shore where the road from Pembroke town terminated, and also of another ferry from a place called Nayland to the same point. The town of Pembroke is at the distance of two miles from the shore. In consequence of an extensive dock-yard having been constructed lower down the haven, called Pater Dock, a new road had been made from Pembroke town to Pater Dock, and which road passed by or near a place called Hobbes's Point, where a hard or pier had been constructed, and which was about half a mile lower down on the haven than the Pembroke Ferry-house. It appeared that the defendant had for some time kept a boat on the haven, and had frequently carried passengers from Nayland to Pater Dock ; but on one occasion, when the defendant's boy was plying at Nayland, a person named Llewelyn got into the defendant's boat, and, after the boy had pushed off from the shore, desired to be taken to Hobbes's Point, saying he was going to Pembroke. Since the new road had been made, it was nearer to go from Nayland by Hobbes's Point to Pembroke, than from Nayland by the Pembroke Ferry-house. One question in the cause was, whether the plaintiff's ferry extended from Nayland to Pater Dock, on the Pembroke side ; but this the jury negatived. The plaintiff, however, contended that the defendant, by carrying a passenger from Nayland to Hobbes's Point to go to Pembroke, had, in point of law, infringed his ferry, and that he was entitled to a verdict. For the *defendant, it was contended, that there was nothing to shew either that this was intended as an infringement of the plaintiff's ferry, or that it was done in fraud of it ; and even if it were, yet that it was an act done by the defendant's servant without authority, for which the defendant could not be made responsible. The learned Judge left it to the jury to say, whether the act had been done

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fraudulently, which they negatived. He then directed them to find for the defendant, but gave the plaintiff leave to move to enter a verdict for him, if the Court should be of opinion that these facts amounted, in point of law, to an infringement of the plaintiff's right. The *Attorney-General* having obtained a rule accordingly, cause was shewn in Hilary Term last by

John Evans, for the defendant :

There are two points for the opinion of the Court in the present case. 1st, Whether the defendant was liable for the act of his servant in carrying a passenger from Nayland to Hobbes's Point. 2ndly, Whether that was, in point of law, an infringement of the plaintiff's ferry from Nayland to the Pembroke Ferry-house. First, the defendant was not liable for the act of his boy. The boy was not authorized by his master to carry persons to Pembroke town by way of Hobbes's Point, but his employment was only to carry passengers to Pater Dock. He was, therefore, not acting within the scope of his general authority, and his master cannot be responsible for his act. Secondly, the act itself was not an infringement of the plaintiff's ferry, it not having been done fraudulently, or with an intention to infringe it. The question cannot depend upon the circumstance of this being a nearer route to Pembroke than by the plaintiff's ferry; for, suppose a new road were made, and Pembroke was so situated that it should become nearer to go by Pater Dock to Pembroke, is it to be said that it would be an infringement of the plaintiff's ferry to convey passengers from Nayland to Pater Dock? That *certainly is not the law; and it would be very inconvenient to the public if it were so. The case of *Tripp v. Frank* (1) is decisive of the present case. There Lord KENYON said, " If certain persons, wishing to go to Barton, had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here, these persons were substantially, and not colourably merely, carried over to a different place; and it is absurd to say, that no person shall be permitted to go to any other place on the

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(1) 2 R. R. 495 (4 T. R. 666).

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Humber than that to which the plaintiff chooses to carry them." In the present case the jury have negatived any fraudulent intention. According to that decision, also, it appears that the plaintiff cannot be compelled to carry passengers to Hobbes's Point, for Lord KENYON adds—"It is now admitted that the ferryman cannot be compelled to carry passengers to any other place than Barton: then his right must be commensurate with his duty." That, as was said by ASHHURST, J., in the same case, is decisive against the plaintiff.

Sir J. Campbell, Sir W. Owen, Chilton, and E. V. Williams, contra:

First, the master was liable for the act of his servant, as it was clearly within the scope of his authority. The master kept a boat, which he used by his servant, and received the money which he earned; and when the boy received a passenger on board, and rowed him to Hobbes's Point to go to Pembroke, he committed an act for which his master was liable. It was not a wilful act done by him contrary to his master's directions, but it was an act done by him in the course of his ordinary employment. The master was therefore responsible. *Turberville v. Stampe* (1), *Bush v. Steinman* (2). It is not necessary to shew express orders given to the servant to do the particular act, to render the master liable: *Rex v. Almon* (3). *Secondly, this amounted to an infringement of the plaintiff's ferry. The plaintiff was bound to keep a boat to convey all passengers going from Nayland to Pembroke; and the right of ferry is co-extensive with such obligation. This passenger was going from Nayland to Pembroke, and the defendant, by carrying him to Hobbes's Point, to enable him to get to Pembroke, committed an injury to the plaintiff's right of ferry. The case of *Tripp v. Frank* is in reality an authority for the plaintiff, as it shews that a person who carries passengers near to an ancient ferry, either at a short distance above or below it, subjects himself to an action. This was not only near the line of the plaintiff's ferry, but may be said to have been on it, for a ferry is not a

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(1) 1 Ld. Ray. 264.

(3) 5 Burr. 2686.

(2) 1 Bos. & P. 404.

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mathematical line from point A. to point B., but must have some considerable extent on each side, otherwise it would be of no avail. The line therefore from Nayland to Hobbes's Point may be considered as the Pembroke Ferry.

(LORD ABINGER, C. B.: That might be true, if going to Pembroke Ferry meant Pembroke town.)

PARKE, B.: This might have been an infringement, if the plaintiff was obliged to carry all persons going to Pembroke town.)

If there had been a town on the south side of the haven, it would have been an infringement to have carried and landed persons a little lower down on the shore for the purpose of going there, according to the case of *Tripp v. Frank*; and this, it is submitted, was substantially the same. In *Tripp v. Frank*, the passengers were not going to Barton; but here this passenger was going to Pembroke, the place to which the plaintiff's ferry leads. The authorities on this subject are very few. In 2 Rolle's Abr. 140, tit. Nusans (G) pl. 4, there is the following passage, for which the Year Book 22 Hen. VI. c. 14, is cited as an authority: "If I have a ferry by prescription, and another erects another ferry on the same river near to it, by which my ferry is injured (*empaire*), that is a nuisance to me, for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I *shall be grievously amerced;" and that passage is also referred to in Com. Dig., Action on the Case for a Nuisance. The next case is that of *Churchman v. Tunstall* (1), which appears, according to the report, to be against the proposition here contended for, because there a bill had been filed for an injunction by the farmer of a ferry against a person who had carried passengers over the river three quarters of a mile below the ferry, and it was held no infringement: but the reporter adds a query.

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(PARKE, B.: That case is no authority, as there was afterwards

(1) Hardres, 162.

a decree in that case by Lord HALE that the new ferry should be put down.)

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The case of *Blissett v. Hart* (1) is an authority to shew that where another person sets up a new ferry near an ancient ferry, the owner of the ancient ferry has his remedy by action.

(PARKE, B. : The case of *Tripp v. Frank* certainly does appear somewhat contradictory to *Blissett v. Hart* and the older authorities.)

Tripp v. Frank seems to have been somewhat of a hasty decision; and it is to be observed that no authorities appear to have been cited. The proposition laid down in Com. Dig. as to ferries, immediately precedes the propositions as to markets, to which they are analogous. It is laid down, that, if a new market be set up within seven miles of an ancient market, on the same day, the law will intend it to be a nuisance, but if it be on a different day, it is a question for the jury whether it is a nuisance or not. It is held reasonable that every man should have a market within seven miles; that is, about one-third of a day's journey, computed at twenty miles. If it be true with respect to markets, that a person shall not be allowed to set up a new market within seven miles of an ancient market, the same principle is applicable to the case of ferries; and the principle as to the former is, that a new one shall not be set up where *there is an ancient one, which is available within a reasonable distance. In this case, the plaintiff's ferry was equally available for the purpose for which the other was used, and if this were allowed, it would be a manifest injury to the plaintiff's ferry. It is laid down in Blackstone's Commentaries (2) that, "If a ferry is erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For, where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the King's subjects; otherwise he may be grievously amerced. It would therefore be extremely hard if a new ferry were suffered to share

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(1) Willes, 508.

(2) Vol. 3, p. 219.

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his profits, which does not also share his burthen." In this case the plaintiff is bound to keep boats at Nayland Ferry, and he is therefore entitled to the corresponding advantages resulting from the exclusive right of ferry.

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD ABINGER, C. B. :

This was an action on the case for the disturbance of the plaintiff's ferry over Milford Haven, tried before my brother Parke, at Haverfordwest. It was claimed in the declaration in different ways; but the question reserved for the consideration of the Court arises on the count which complains of a disturbance of Nayland Ferry.

The plaintiff was the lessee, under Sir John Owen, of a ferry, called the Pembroke or Burton Ferry, across Milford Haven, which was the ordinary communication between Pembroke and Haverfordwest. He was also lessee, under the same gentleman, of another ferry from the same point, on the Pembroke side, to Nayland and back; there was no question as to the right of the plaintiff to *both these ferries. He claimed also a much more extensive right, that of ferrying all persons backwards and forwards over Milford Haven, within no very narrow limits; but this right was negatived by the jury on the trial.

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It appeared, however, that the defendant had, before the commencement of this suit, set up a boat to carry passengers from Nayland to the opposite side, and, amongst other places, to Hobbes's Point, more than half a mile from the Pembroke Ferry-house. At this place a hard or pier had been built, to improve the communication between England and Ireland, and a road made from thence to Pembroke, which communicated with the turnpike road from Pembroke Ferry to Pembroke, at a distance of more than half a mile from the ferry; and the way from Nayland to Pembroke, by Hobbes's Point, was shorter than by Pembroke Ferry. There was no town or vill between Hobbes's Point or Pembroke Ferry, and the junction of the new with the old road; and, I rather believe, none between that

point and Pembroke, although that circumstance was not inquired into on the trial.

On one occasion, a boy in the service of the defendant, and in his boat, received a passenger on board at Nayland, who, after the boat had been shoved off the shore, informed him he was going to Pembroke, and desired to be put on shore at Hobbes's Point; and this was done.

The jury having found for the defendant on the other questions in the cause, these points were reserved for the consideration of the Court—1st, whether the defendant was responsible for this act of his servant; and, 2ndly, whether, if he was, the facts proved amounted to a disturbance of the plaintiff's right of ferry, the jury having negatived any fraud in fact on the part of the defendant or his servant.

A rule *nisi* having been granted for a new trial, the case was argued before my brothers Parke, Bolland, Gurney, and myself.

Upon the first point there is no difficulty. The servant was acting at the time in the course of his master's service, and for his master's benefit; and his act was that of the defendant, although no express command or privity of his master was proved: *Turberville v. Stampe* (1).

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The second point is one of a more doubtful nature, and has called for much consideration. It is quite clear, that a ferry is a franchise which none can set up without a licence from the Crown; and in the case of a ferry by prescription, a grant or licence is presumed. As early as in the Year Book, 22 Hen. VI. 146, it is thus laid down by Paston, "If I have of ancient time a ferry in a town, and another sets up a ferry on the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case;" and Newton says, "the case of a ferry differs from that of a mill, for you are bound to sustain a ferry, to serve and repair it, in ease of the common people, and it is inquirable before the sheriff in his tourn, and justices in *Eyre*." This proposition is quoted in 2 Roll. 140 (G), pl. 4, Com. Dig. Piscarry, B., and Action on the Case for a Nuisance, and in most of the cases in which the rights of ferry have come in question.

(1) 1 Ld. Ray. 265.

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In the case of *Churchman v. Tunstall* (1), in the Exchequer, in the time of the Commonwealth, 1659, the plaintiff, the farmer of a ferry at Brentford, as it would seem, under the Crown, filed a bill for an injunction to restrain the defendant, who had lands on both sides of the Thames, three quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so. The bill was dismissed without costs; but the reporter adds a query as to the propriety of the decision; and even if it was right, it is no authority against the maintenance of an action on the case. The decision, however, appears to have been wrong; for, upon another *bill filed in 1663, after the Restoration, a decree was made by Lord HALE, on the 18th of June, 14 Car. II., in favour of the same plaintiff, that the new ferry should be put down.

In *Blissett v. Hart* (2), the plaintiff recovered in an action on the case, against the defendant, for setting up another ferry over the same river, near the plaintiff's ferry, and ferrying over persons and horses over the same river, near the plaintiff's ferry, by which she was obliged to let it for less rent than before, and had been deprived of great part of the profit of it. On motion in arrest of judgment, the Court held the declaration to be good, and they said, that "a ferry is a franchise that no one can erect without a licence from the Crown; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a licence, the Crown has a remedy by *quo warranto*, and the former grantee has a remedy by action. The franchise is the ground of the action" (3).

So far the authorities appear to be clear, that, if a new ferry be set up without the King's licence, to the prejudice of an old one, an action will lie; and there is no case which has the appearance of being to the contrary, except that of *Tripp v. Frank*, hereafter mentioned. These old authorities proceed upon the ground, first, that the grant of the franchise is good in law, being for a sufficient consideration to the subject, who, as he receives a benefit, may have, by the grant of the Crown, a corresponding obligation imposed upon him in return for the benefit

(1) Hardres, 162.

(2) Willes, 508.

(3) Willes, 512, n.

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received ; and secondly, that, if another, without legal authority, interrupts the grantee in the exercise of his franchise, by withdrawing the profit of passengers, which he would otherwise have had, and which he has, in a manner, purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury ; and the case is, in this respect, analogous *to the grant of a fair or market, which is also a privilege of the nature of a monopoly.

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A public ferry, then, is a public highway, of a special description, and its *termini* must be in places where the public have rights, as, towns or vills, or highways leading to towns or vills. The right of the grantee is, in the one case, an exclusive right of carrying from town to town, in the other, of carrying from one point to the other, all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers, must be injurious.

For instance, if any one should construct a new landing place at a short distance from one *terminus* of the ferry, and make a practice of carrying passengers over from the other *terminus*, and there landing them at that place, from which they pass to the same public highway upon which the ferry is established, before it reaches any town or vill, and by which the passengers go immediately to the first, and all the vills and towns to which that highway leads ; there could not be any doubt that such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry or not.

If such new ferry be nearer, or the boats used more commodious, or the fare less, it is obvious that all the custom must inevitably be withdrawn from the old ferry ; and thus the grantee would be deprived of all benefit of the franchise, whilst he continued liable to all the burthen imposed upon him.

It does not follow from this doctrine, that, if there be a river passing by several towns or places, the existence of a franchise of a ferry over it, from a certain point on one side to a point on the other, precludes the King's subjects from the use of the river, as a public highway from or to all the towns or places on its

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banks, and obliges them, *upon all occasions, to their own inconvenience, to pass from one *terminus* of the ferry to the other. The case of *Tripp v. Frank* (1) decided otherwise; and it is not intended to question that decision. It was there held that the plaintiff, who had a right of ferry from Hull to the town of Barton, had no right of action against a person who carried passengers from Hull to Barrow, a place on the banks of the river, at some distance from Barton. But, suppose he had known that the passengers were going by that route to Barton, and that their sole object was to go there; or suppose that Barton, instead of being within a few hundred yards from the Humber, was a mile distant, and was the first town with which either ferry communicated, it would not follow, from that decision, that in such a case passengers might be landed at Barrow, for the sole purpose of going to Barton.

We have thought it right, in consequence of the course taken by the counsel in argument, to enter thus far into the general question, and to lay down these principles, that it may not be supposed that the decision to which we find ourselves obliged to come, can in any manner affect the plaintiff's right to the exclusive privilege of ferrying passengers who leave Nayland, with no other object than that of going to Pembroke.

But, fully admitting his right, we are of opinion, after much deliberation, and I may add, not without some hesitation, that there is no sufficient ground for making the rule absolute.

It is to be observed, that, between Hobbes's Point and the junction of the two roads that lead from that place and from Pembroke Ferry respectively to the town of Pembroke, there are intermediate points, to which the passenger Llewelyn might be going; though Pembroke was his ultimate object, it might not be his only object; and, if he *had any particular view of convenience in making Hobbes's Point the place of his landing, which could not have been accomplished as well by landing at Pembroke Ferry, then, according to the principles laid down in the case of *Tripp v. Frank*, there would have been no evasion of the plaintiff's ferry. It is true, that the intentions of Llewelyn are left very uncertain upon the evidence; and it does not appear

(1) 2 R. R. 495 (4 T. R. 666).

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from the report, that the counsel on either side thought proper to elicit them by any inquiry. And if this had been the real question which the parties intended to try, the Court might have been disposed to direct a new trial. But one cannot fail to observe that the main questions of fact in difference were fully tried and disposed of by the jury, and that the point stated upon Llewelyn's evidence was laid hold of for no other purpose than that of recovering a verdict for the plaintiff at all events, after all the matters really in difference had been decided against him. The Court, therefore, is bound to look with strictness to the evidence, and not to allow the plaintiff any advantage from an uncertainty that he ought to have removed. It was incumbent on him to offer satisfactory proof that Llewelyn had no other object than to evade his ferry, and that the defendants were aware, and must have understood, that he had no other object. Now, the communication made by Llewelyn to the defendant's servant, after the boat had commenced her passage, is not inconsistent with his having some legitimate object in going to Hobbes's Point, besides that of going to Pembroke. The uncertainty, therefore, in which this point has been left by the evidence, makes it impossible to say that the facts proved amounted to a disturbance of the plaintiff's ferry; therefore the rule cannot be made absolute, to enter a verdict for the plaintiff. And we think that the plaintiff, in a case of this sort, is not entitled to a new trial, that he may amend his evidence upon an incidental point, upon which he left it too doubtful to be *properly submitted to the jury. The rule, therefore, must be discharged.

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Rule discharged.

WHITEHEAD v. PRICE AND OTHERS (1).

(2 Cr. M. & R. 447—457; S. C. 1 Gale, 151; 5 Tyr. 825.)

In a policy of insurance against fire on certain cotton mills, millwrights' work, including standing and going gear therein, engine-house adjoining and the steam-engine therein, &c., it was recited that, the "buildings were brick-built and slated; warmed exclusively by steam, lighted by gas, &c., worked by the steam-engine above mentioned; in

1835.

*Each. of
Pleas.*

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(1) Cited by Lord DENMAN, Ch. J., and followed in *Mayall v. Mitford* (1837) 6 Ad. & El. 670.—R. C.

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the tenure of one firm only, standing apart from all other mills, and 'worked by day only : ' " Held, that it was no breach of the policy that the steam-engine was kept going by night, and that the shafting, which went through the mill, was turned by it, the cotton mill not being worked except by day only.

COVENANT. The declaration stated, that heretofore, to wit, on the 23rd March, 1833, by a certain deed-poll, being a policy of insurance, then made and sealed with the respective seals of the defendants, being directors of a certain company called the Protector Fire Insurance Company, (*profert in curiam*), after reciting that the plaintiff and John Mayall (who died before the commencement of the suit) had paid the sum of 32*l.* to the directors of the Protector Fire Insurance Company in London, and had also agreed to pay the sum of 32*l.* yearly, on the 25th day of March, during the continuance of the said policy, for insurances from loss or damage by fire, the property thereby described not exceeding the sum specified under each head of insurance; namely, on the larger end of a cotton mill, called Union Mill (A), 1,800*l.*; on millwrights' work, including the standing and going gear therein, 200*l.*; on the smaller end of the said cotton mill (B), 900*l.*; on millwrights' work, including the standing and going gear therein, 100*l.*; on the engine-house, adjoining the larger end of the said mill, and being under the same roof therewith (C), 400*l.*; on the steam-engine therein, 350*l.*; on the warehouse, communicating with the said mill by a staircase, the upper room of which was used for blowing and scutching cotton in, 250*l.*: and reciting that the aforesaid buildings were brick-built and slated, situate near Oldham, in the county aforesaid; warmed exclusively by steam; lighted by gas from the Oldham Gas Light Company's works, which gas, in the blowing and scutching room, was inclosed in glass; worked by the steam-engine above-mentioned, in tenure of one firm (Messrs. Bowden Gartside & Co.) only, standing apart from all other mills, and worked by day only; and that the marks had reference to a plan of the building on the order for the said insurance; the said defendants did covenant and agree with the said James Whitehead and John Mayall, that, from the 25th March, 1833, to and inclusive of the whole 25th March, 1834, and so long as the said insured should pay, or cause to be paid.

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the sum of 32*l.* at the time therein above mentioned, and the directors for the time being should accept the same, the stock and funds of the said company should be subject and liable to pay or make good to the said insured, their executors, administrators, or assigns, all such loss or damage as should happen by fire (except loss or damage by fire happening by any invasion, foreign enemy, civil commotion, or riot, or any military or usurped power whatever) to the property therein above mentioned, amounting in the whole to no more than the sum of 4,000*l.*, according to the conditions indorsed on the said policy, as by the said policy, reference being thereunto had, will more fully appear; and the said plaintiff further says, that the said conditions, in and by the said deed or policy mentioned and alluded to, are as follows, (that is to say) First—that every person desirous of effecting an insurance must state his name, place of abode, and occupation; he must describe the construction of the buildings to be insured, where situate, and in whose occupation, of what materials the same were respectively composed, and whether occupied as a dwelling-house or otherwise; also the nature of the goods or other property on which such insurance might be proposed, and the construction of the buildings containing such property. *Secondly—that every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, or the goods therein, was to be specially mentioned in the order given for the policy, so that the work might be fairly understood; if not so expressed, or if any misrepresentation be given, so that the insurance be effected upon a lower premium than ought to be paid; or if buildings or goods be described in the policy otherwise than they really were; or if, after an insurance should have been effected, the risk should be increased by the erection or alteration of any stove, the carrying on any hazardous trade, operation, or process, the deposit of any hazardous goods or hazardous communication; the insured would not, except under the consent of the directors and on the terms they might impose, be entitled to any benefit under his policy.

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The declaration (after setting forth eight other conditions upon

WHITEHEAD however, overruled the objection, and the plaintiff obtained
PRICE a verdict; but he gave the defendants leave to move to enter a verdict.

Cresswell having obtained a rule accordingly—

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Blackburne, Alexander, and Wightman were to have shewn cause; but they having suggested that the fourth and sixth pleas (which were the only pleas which there was any evidence to sustain) were bad, and that the plaintiff would therefore be entitled to judgment *non obstante*, if a verdict were entered up for the defendants on the issue raised by those pleas, the Court called upon—

Cresswell, Tomlinson, and W. H. Watson, to argue that question :

The fourth and sixth pleas are good, and are a sufficient answer to the action, if found for the defendants, which they must be taken to have been. First, as to the fourth plea. The policy recites, that the buildings were brick-built, warmed by steam, lighted by gas, &c., worked by the steam-engine before mentioned, in the tenure of one firm only, standing apart from all other mills, and worked by day only. Now, what is the meaning of worked by day only? It must have a reasonable intendment given to it; it must mean all that is before mentioned in the policy capable of being worked. Now there is mentioned before, the standing and going gear, which was kept going by night, and that was in contravention of the policy. This must be construed as a prohibition to working by night with any part of the manufactory insured. There are three things to constitute a mill: there is, first, the moving power; secondly, the medium of its application, of which the gear is a part; and, thirdly, the machinery to be moved; and any working by night of any part of this is forbidden by the policy. In this case, the shafts, which are part of the gear, were kept moving and turning by night, and that was in breach of the policy. Turning is a working, although applied to no ultimate purpose. But the words, "worked by day only," apply to every thing mentioned in the policy; and, therefore, the working the steam-engine by night alone would be a

breach of the warranty. It is said, that the *words must be taken most strongly against the covenantors: but this is a warranty, and it has been held, that, in a policy, a warranty must be construed strictly. Then, as to the sixth plea. It is found that the steam-engine was worked by night; and the other allegation in this plea, "whereby the risk in the policy of assurance was increased," is not put in issue, and therefore must be taken to be admitted.

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(ALDERSON, B.: But the jury found the question as to the increase of risk in the negative.)

It is submitted that the increase of risk was not in issue on the sixth plea.

(PARKE, B.: Then the result would be, that the issue would be an immaterial issue, as the fact of its being worked by night is immaterial, if the risk is not increased.)

If it is found that the steam-engine is worked by night, then the rest of that which is stated in the plea necessarily follows; not being put in issue, it stands admitted. In *Beal v. Simpson* (1), it was held, that a *virtute cujus*, when it contains an inference of law only, is not traversable; but where it states a matter of fact, that it is traversable. And all the cases shew, that where there is a matter of fact alleged which is traversable, if it is not traversed, it is admitted. *Lucas v. Nockells* (2). In that case, it was said by BEST, Ch. J., in delivering the judgment of the Court of Exchequer Chamber—"But the *virtute cujus* sometimes raises a mixed question of law and fact; and when this is the case, there may be a traverse, for that is the only mode by which the facts are to be settled on which the law depends." The plea states two facts, and the defendants might have traversed either the one or the other, or both; but one not being traversed, must be taken to be admitted.

Blackburne and Wightman, contra, were stopped by the COURT.

(1) 1 Ld. Ray. 408.

(2) 29 R. R. 721 (4 Bing. 729;
1 Moore & Payne, 783).

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This case has been involved *in a good deal of perplexity in the course of the argument, and we are called upon to put a grammatical construction upon a passage in this policy, and to say whether the steam-engine is the nominative case to the second word "worked," in the sentence in question ; and I think it clearly is not. Another question is, whether by working is meant turning ? It has been pressed upon us in the argument, that the upright shafts must be considered as part of the steam-engine, and the millwright work as part of the mill, and that as the shafts were kept turning during the night, it was in contravention of the policy ; but that is confounding the word working with the word turning. The shafts, during the night, were moving, but the mill was not working : the word "work," is not to be used in its popular sense. The interrogatory on the paper is, "Do you work it by night or by day ?" The answer is, "We work it by day ;" that is, we work by day only ; our hands are on during the day only, and not during the night. I do not think the mere moving or turning of the upright shafts is a working in the sense that has been ascribed to it ; and I think that judgment ought to be entered for the plaintiff. It requires that something more be shewn to have been done to discharge this policy. If the turning, by night, that which forms part of the machinery, were attended with increased risk, it might be sufficient to discharge the policy ; but unless that is so, I think it is not sufficient.

PARKE, B. :

I am of the same opinion. The question arises on a motion for judgment *non obstante veredicto*, and turns on the validity of the fourth and sixth pleas. Now admitting, for the sake of argument, that both these pleas are to be taken to be proved to the full extent, it appears to me that they neither of them afford any answer to the action. The fourth plea is, "That the said steam-engine, and certain parts of the gear in the said policy of assurance mentioned, were, after the making of *the said policy, and before the destruction of the said premises by fire, without the leave or consent of the defendants, or of the

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directors of the company, worked by night, and not by day only, contrary to the tenor and effect, true intent, and meaning of the said policy." Now, first, we may assume that the steam-engine and part of the gear have been worked without the leave and consent of the defendants, or of the directors of the company, by night and not by day only; and the question is, does that avoid the policy; and that depends entirely upon the construction to be given to the words "work by day only." In the policy itself the language is somewhat obscure; but I think the words "worked by day only," cannot be applied to the steam-engine, or any part of the gear, but apply to something else. I think that it is a fair construction of all the terms that are used in this part of the policy. The insurance is on the larger end, and another end of a mill called the Union Mill, upon the building of the engine-house and steam-engine, and the building of the warehouse used for the blowing and scutching of cotton. The policy recites, "that the aforesaid buildings were brick buildings, and slated, lighted by gas," that applies to all the buildings; "and worked by the steam-engine above mentioned." Now, all the buildings cannot be worked by the steam-engine above mentioned. We must put a limited construction upon these expressions. I take it to mean, "all the buildings above mentioned which are capable of being worked by the steam-engine;" and therefore I read this part of the insurance, that the cotton mill should be worked by the steam-engine, and worked by day only; and it appears to me that the meaning of this insurance is, that it insures the cotton mill, which is worked by a steam-engine, and by day only. If this is the meaning, no part of the cotton-mill having been worked except by day, the plea is no answer to the declaration. Then, as to the sixth plea, it appears to me that the answer *to be given to that is the same as the answer to the fourth, unless you can bring it within the second condition indorsed on the back of the policy. Now, that provides, that when any insurance is attended with particular circumstances of risk arising from the situation or construction of the premises, or from the nature of the trade carried on, &c., such circumstances must be specially mentioned; or if any misrepresentation be given, so that the insurance

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is effected on a lower premium than it otherwise would be, the policy is avoided. So, also, if there had been any alteration made, increasing the risk, after the insurance had been completed, or if any hazardous trade, operation, or process, was carried on which was not carried on at the time of the policy being granted, the policy is avoided; but there is no averment that there was any such operation carried on which was not carried on at the time the insurance was effected, as there ought to be to bring the case within this condition. It appears to me that the sixth plea is therefore wholly bad.

BOLLAND, B.:

I am of the same opinion. The only question here is, what is the interpretation to be put upon the words "worked by day only," as contained in this policy. Now, on looking at the policy itself, and the subject-matter of it, I have no doubt that the mill, and the mill only, is the nominative case to the words "worked by day only." There is, no doubt, great ambiguity on the face of the policy; and the only safe construction I can put upon it is that which has been adopted by the Court.

ALDERSON, B.:

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I quite agree with the rest of the Court in the construction which they have put upon this policy. It seems to me that the ambiguity of the policy arises from the position of the words having been changed. If, after *the words "worked by the steam-engine above mentioned," you read on, "and worked by day only," there is no doubt that the latter words refer to the mill. That view is corroborated by the words which immediately follow, "standing apart from all other mills."

Rule absolute to enter judgment for the plaintiff.

AMNER *v.* CLARK (1).

(2 Cr. M. & R. 468—471; S. C. 1 Gale, 191; 5 Tyr. 942; 5 L. J. (N. S.) Ex. 254.)

1835,
*Exch. of
Pleas.*
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A bill of exchange drawn in London, payable to the order of the drawer in London, upon a merchant residing at Brussels, and accepted by him, payable in London, is an inland bill of exchange, and must be stamped as such.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, drawn by one Wm. Walker upon the defendant, payable in London, and accepted by him payable in London, and indorsed by Walker to the plaintiff. The declaration averred that the bill was presented for payment, and dishonoured. The defendant pleaded that he did not accept the bill of exchange mentioned in the declaration.

At the trial before Gurney, B., at the sittings in London, the bill of exchange, on being produced, was as follows :

“LONDON, 11th Oct., 1833.

“For 312*l.* 11*s.* 9*d.*

“At three months’ date, pay this first of exchange to the order of self, in London, three hundred and twelve pounds eleven shillings and ninepence sterling, value received, which place to account as advised.

“WILLIAM WALKER.

“To Mr. DELIANSON CLARK,

“No. 51, Rue Ducall, in Brussels.

“1st.”

“Accepted, payable at Mr. Jebson’s,

“No. 16, Old Broad Street, London.

“DELIANSON CLARK.”

The bill was stamped with a 4*s.* stamp only. The defendant, it was proved, was a merchant, residing at Brussels, but there was no proof that the bill was accepted there. It was objected that the stamp was insufficient, and ought to have been 8*s.* 6*d.* The learned Judge received the bill in evidence, but gave the

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(1) See Bills of Exchange Act, 1882, s. 4.—R. C.

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defendant leave to move to enter a nonsuit. *Platt* having, in last Term, obtained a rule accordingly—

Sir F. Pollock and Channell now shewed cause :

The question is, whether this, being a bill drawn in England, upon a person residing abroad, payable in London, and accepted by him payable in London, is an inland bill, and requires to be stamped as such. The statute 55 Geo. III. c. 184, sch. part 1 (1), after stating the duties which shall be chargeable on inland bills of exchange, proceeds thus—"Foreign bill of exchange (or bill of exchange drawn in but payable out of Great Britain) if drawn singly, and not in a set, the same duty as on an inland bill of the same amount and tenor;" and that "foreign bills of exchange, drawn in sets according to the custom of merchants, for every bill of each set" shall be charged with duty according to the amount thereof. This bill of exchange, as set out in the declaration, "pay this my first of exchange," &c., is not a bill coming within the former description, "if drawn singly and not in a set;" but must be taken to be a "foreign bill drawn in sets," within the latter description. It appears on the face of it to be one of several bills, and there is no proof that there were not more; and without any such evidence, it is not to be presumed that there was any fraud. At all events, the defendant, having accepted it as one of a set, is estopped from disputing it: *Holdsworth v. Hunter* (2). The bill, being drawn on a person abroad, required to be accepted abroad before it became a complete *bill. If it comes within neither of the descriptions in the schedule, then it is a *casus omissus* in the Act. It may be that there is another species of foreign bill, namely, when it is drawn in England upon a person residing abroad, and accepted by him payable in England.

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(LORD ABINGER, C. B.: This bill is by the drawer himself made payable in England.)

If not a foreign bill, is this an inland bill? It is submitted that it clearly is not.

(1) See now the Stamp Act, 1891, s. 35,

(2) 34 R. R. 479 (10 B. & C. 449; 5 Man. & R. 393).

(LORD ABINGER, C. B. : The statute seems to have considered all bills as inland bills where they are drawn in Great Britain, unless where they are payable out of it.)

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That is not clear, and the defendant is bound to make out that it is within the Act. The statute is silent as to the meaning of the term "inland bill."

(LORD ABINGER, C. B. : It defines it by saying what a foreign bill is, and all others are to be taken to be inland bills.)

In *Mahoney v. Ashlin* (1), Lord TENTERDEN states what an inland bill is. He says : "The statute 9 & 10 Will. III. c. 17, distinctly explains what was understood to be an inland bill at that time, and says that by that term was meant a bill drawn in England, Wales, or Berwick-upon-Tweed, upon London, or some other place within those parts of the realm ; and the term is used in subsequent statutes apparently in the same sense." If that definition be correct, this bill does not fall within it, for it was not drawn upon London, or any other place within the realm. If it be neither an inland or a foreign bill, then it requires no stamp at all ; and if it be a foreign bill, it is stamped as such. It may be said that there is no proof that the bill was accepted abroad ; but it purports to be so, and if the defendant intended to insist that there was any fraud on the Stamp Act, it was incumbent upon him to prove it : *Abraham v. Dubois* (2).

Humfrey, contrà, was stopped by the Court.

LORD ABINGER, C. B. :

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This case has been very ingeniously argued ; but I do not think that this can be considered as a foreign bill of exchange. The Legislature might have defined what was to be considered an inland bill, but they have not done so ; and I cannot think that it was necessary to do so, as there is a definition of what a foreign bill is, and I think the Act shews that by foreign bills the Legislature intended bills drawn in, but payable out of, Great Britain. The Legislature never intended to impose a

(1) 2 B. & Ad. 482.

(2) 4 Camp. 269.

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stamp on bills drawn abroad ; it was not in their power to do so ; but they did mean to impose a stamp on bills drawn in England, payable abroad, because it was in their power to tax them. The statute, *prima facie*, intends that inland bills are such as are not drawn payable abroad.

BOLLAND, B. :

I am of opinion that this is an inland bill within the meaning of the statute. An inland bill is a bill drawn in and payable in Great Britain, which this bill is.

GURNEY, B. :

The Act provides, that a bill drawn in England for such an amount is to be stamped with the stamp of 8s. 6d., unless it is drawn payable abroad. There is no pretence for saying that this was a bill drawn payable out of England.

Rule absolute for entering a nonsuit.

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*Exch. of
Pleas.*

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VERRALL v. ROBINSON (1).

(2 Cr. M. & R. 495—496 ; S. C. 1 Gale, 244 ; 5 Tyr. 1069 ; 4 Dowl. P. C. 242.)

In an action of trover for a chaise, it appeared that one B. had hired the chaise in question from the plaintiff, and had placed it at livery with the defendant, and that whilst it was in the defendant's possession, in the city of London, it was attached by process out of the Sheriff's Court. The plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver it : Held, that there was no evidence of a conversion by the defendant, the chaise being at the time of the demand in the custody of the law, and not of the defendant.

TROVER for a chaise. Pleas—first, not guilty ; secondly, that the said chaise in the declaration mentioned was not, at the time of the supposed conversion thereof by the defendant to his own use, the property of the plaintiff, in manner and form, &c., and issue thereon.

(1) Distinguished in judgments in *Catterall v. Kenyon* (1842) 3 Q. B. 310 ; *Pillot v. Wilkinson* (Ex. Ch. 1864) 3 H. & C. 345, 34 L. J. Ex. 22.

And see per COTTON, L. J., in *Lery v. Lovell* (1880) 14 Ch. D. 234, 242, 49 L. J. Ch. 305, 310.—R. C.

At the trial before Parke, B., at the Middlesex sittings in this Term, the jury found a verdict for the plaintiff on the second issue; but the learned Judge being of opinion that there was no evidence of a conversion, directed them to find for the defendant on the first issue. It appeared that the plaintiff was a coach manufacturer, and the defendant a livery-stable keeper, residing in Little Britain, in the city of London; that one Banks had hired the chaise in question of the plaintiff, and had taken it to the defendant's, where he left it upon sale, together with a horse of his own, and that whilst it remained in the defendant's possession, it was attached by process out of the Sheriff's Court, in an action against Banks. The plaintiff demanded the chaise from the defendant, but the defendant said it had been seized under an attachment out of the Sheriff's Court, and refused to deliver it up. The plaintiff made a second application when Banks was present, who admitted that the chaise was the property of the plaintiff. The defendant requested time to consider whether he ought to give up possession of it, but afterwards refused to do so. The learned Judge was of opinion that this did not amount to evidence of a conversion, and directed the jury to find their verdict for the defendant on the general issue; which they accordingly did.

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ROBINSON.

Humfrey now moved to enter a verdict for the plaintiff on the first issue. He submitted that there was in this *case sufficient evidence of a conversion, as there was a clear demand and refusal.

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(LORD ABINGER, C. B.: The objection is, that there was an attachment lodged against the property out of the Sheriff's Court.)

The attachment only bound the defendant not to deliver the chaise to Banks, who was the defendant in the action in the inferior Court; but when the real owner of the chaise demanded it, it was at the defendant's peril to refuse to deliver it up.

LORD ABINGER, C. B.:

I am of opinion that there was in this case no evidence of a

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conversion. There is nothing to shew that the defendant ever intended to convert the chaise to his own use. It was attached as the property of Banks, after which it was in the custody of the law, and the defendant had it not in his custody or power to deliver; and he says, on its being demanded, that it is in the custody of the law, and that he cannot deliver it.

ALDERSON, B. :

Although the chaise was in the defendant's hands, and upon his premises, it was in the custody of the law, and he could not deliver it without a breach of the law. The defendant had no notice of its being the plaintiff's property until after it was in the custody of the law.

Rule refused.

1835.

THOMAS v. MORGAN (1).

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(2 Cr. M. & R. 496—503; S. C. 1 Gale, 172; 5 Tyr. 1085; 5 L. J. (N. S.)
Ex. 64; 4 Dowl. P. C. 223.)

Where the defendant, on being informed that his dogs had bitten the plaintiff's cattle, offered to settle for them, if it could be proved that his dogs had done it: Held, that this was some evidence to go to the jury of the *scienter*, though entitled to but little weight; but that proof that the dogs were of a savage disposition, and had bitten the cattle of other persons, was not evidence that the defendant knew they were accustomed to bite cattle.

[*497] CASE. The declaration stated that the defendant, therefore, to wit, on the 1st day of September, 1833, and from thence for a long space of time, to wit, until and at *the time of the damage and injury to the said plaintiff as thereafter mentioned, wrongfully and injuriously did keep divers, to wit, ten dogs, he, the said defendant, during all that time well knowing that the said dogs then were of a ferocious and mischievous disposition, and used and accustomed to attack, chase, bite, worry, and kill cattle; which said dogs afterwards, to wit, on &c., and on divers other days, &c., did attack, chase, bite, worry, and kill divers, to wit,

(1) It will be observed that the Dogs Act, 1865 (28 & 29 Vict. c. 60).
effect of this class of cases, in regard —R. C.
to cattle and sheep, is altered by the

ten bulls, ten cows, ten oxen, ten heifers, and ten steers, of the said plaintiff, of great value, to wit, of the value of one hundred pounds, by means whereof, &c.

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Pleas. First, not guilty. Secondly, that no dogs or dog of him, the defendant, did attack, chase, bite, worry, or kill any bull, cow, ox, heifer, or steer, of the said plaintiff, in manner and form, &c.

The cause was tried before Williams, J., at the last Spring Assizes for the county of Carmarthen, when it was proved that the defendant's dogs had killed some of the plaintiff's sheep. It was also proved, that these dogs had worried the cattle of other persons, and were of a ferocious disposition; and that when the defendant was told that his dogs had killed the plaintiff's sheep, he promised to settle for the damage, provided it were clearly proved that they had done it. A witness of the name of Protheroe also proved that the defendant's dogs had worried his cattle, and that when he complained of it to the defendant, he said he could not help it, and that he had ordered his dogs to be tied up. This, it appeared, was on the 15th of September, the plaintiff's sheep having been bitten two or three days before. It was objected, that there was not sufficient evidence of the *scienter* to render the defendant liable; and the learned Judge being of that opinion, nonsuited the plaintiff, but gave him leave to move to enter a verdict for the sum of 11*l.* 10*s.*, the value of the cattle, if the Court should *be of opinion that there was sufficient evidence of the *scienter*.

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Chilton, in Easter Term last, moved accordingly, on two grounds:

First, that it was not necessary to prove the *scienter*, it being admitted on the record; and, secondly, that there was evidence of it to go to the jury.

The second plea is, that the dogs did not bite the plaintiff's cattle, but that was clearly proved; the learned Judge, however, thought that the *scienter* was not proved; but that, it is submitted, was admitted on the record. Since the new rules, all that is put in issue by the plea of not guilty is, whether or not the act complained of was done. The rule of Hilary Term,

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4 Will. IV., is, that “in actions on the case, the plea of not guilty shall operate only as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement.”

(LORD ABINGER, C. B.: The *scienter* is no inducement; it is the substance of the issue.)

It was held in *Frankum v. The Earl of Falmouth* (1), that, under the rules of H. T. 4 Will. IV., the plea of not guilty, to a declaration in case, for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere fact of the diversion, and not its wrongful character. That shews that all that the general issue denies is, the act done; and therefore, under the general issue in this case, the only matter in dispute is, did the defendant's dogs worry the plaintiff's cattle?

LORD ABINGER, C. B.:

In *Frankum v. The Earl of Falmouth* the diversion was the injury complained of, and the Court held very properly that the plea of not guilty put in issue the mere fact of the diversion, and not the right to divert. Here, the *scienter* is no inducement; it is a part [*499] of the cause of action. If it was proved that *the defendant's dogs did bite the plaintiff's cattle without the defendant's knowledge of their propensity, he would not be liable to an action.

The COURT refused the rule on this point, but granted a rule on the ground that there was evidence of the *scienter*, which ought to have been left to the jury.

John Evans and *E. V. Williams* shewed cause:

There was in this case no evidence of any previous knowledge in the defendant that his dogs were accustomed to bite cattle, and therefore the nonsuit was right. The rule of law is, that the *scienter* must be clearly proved. The payment to Protheroe was after the plaintiff's sheep were bitten, and therefore does not

shew any previous knowledge; and it cannot be inferred from the circumstance that the defendant promised to settle with the plaintiff for his sheep, if it could be proved that his dogs had killed them, that he had a prior knowledge of their being accustomed to bite cattle. The defendant may have made that promise from motives of charity, and without intending to admit his liability. In *Beck v. Dyson* (1), which was an action on the case for keeping a dog which bit the plaintiff, Lord ELLENBOROUGH held that it was not sufficient to shew that the dog was of a fierce and savage disposition, and usually tied up; and that the defendant promised to make pecuniary satisfaction to the plaintiff, after the latter had been bitten by the dog. The *scienter* is the gist of the action, and must be clearly proved, and cannot be presumed from the disposition or the act of the dogs themselves. In *Hartley v. Harriman* (2), it was held that an averment in the declaration, that the defendant's dogs were accustomed to bite cattle, was not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men. That case *shews that there must be direct evidence of previous knowledge.

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Chilton and W. M. James, in support of the rule :

There was evidence in this case which ought to have been submitted to the jury. From the fact that the defendant, on being informed of the injury, said, "he could not help it, he had ordered the dogs to be tied up;" and his offering to settle the matter if it could be proved that his dogs had done it, the jury might have inferred that the defendant knew of the disposition of the dogs. In *Jones v. Perry* (3), where the action was held maintainable, though it was not proved that the defendant knew his dogs had been used to bite, Lord KENYON laid great stress on the circumstance that the defendant had had his dog tied up, and said that it shewed a knowledge that the animal was fierce, unruly, and not safe to be permitted to go abroad. In *Hartley v. Harriman*, it is said by ABBOTT, J. (4), that in *Judge v. Cox* (5) he left it to

(1) 16 R. R. 774 (4 Camp. 198).

(4) 1 B. & Ald. 623.

(2) 1 B. & Ald. 620.

(5) 18 R. R. 769 (1 Stark. 285).

(3) 2 Esp. 482.

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the jury to say, whether the expression used by the defendant, cautioning a person not to go near the dog least he should be bitten, was not evidence from whence they might infer that to her knowledge the dog had previously bitten some person.

(PARKE, B. : There is no doubt some evidence of the *scienter* ; but we must consult the learned Judge to know how he intended to leave the question to us ; whether he intended that a verdict should be entered for the plaintiff, if we were of opinion that there was some evidence of the *scienter*, or only in case there was substantial evidence of it.)

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court :

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This was an action against the defendant for keeping dogs *accustomed to bite cattle, and which had worried and bit the plaintiff's cattle. After the cause was gone through, and when the case was about to be submitted to the jury, it was objected, on the part of the defendant, that there was no sufficient evidence to go to the jury of the *scienter*. My brother WILLIAMS being of that opinion, nonsuited the plaintiff ; but gave him leave to move to enter a verdict for the sum of 11l. 10s., if the Court should be of opinion that the learned Judge should have left the question of knowledge to the jury on the facts that were proved. Now, upon the facts proved, it was urged on the part of the plaintiff, that the case should have been submitted to the jury, on the question as to whether there was evidence of the *scienter*. One point made on the argument was, that a person of the name of Protheroe had had his cattle bitten by the defendant's dogs ; that the defendant was acquainted with their savage nature, and had offered Protheroe satisfaction for the injury done by them ; but it was stated that the transaction in question, in which the plaintiff's cattle were bitten, occurred before the transaction with Protheroe ; and, on a careful examination of the report, such appeared to be the fact. It appeared that the learned Judge called back John Jones, who proved the transaction in which Protheroe's cattle were bitten ; and upon his examination, it appears upon the report, that this transaction did not take place

before the plaintiff's cattle were bitten. We have consulted the learned Judge, and find that he is satisfied of that fact, and therefore there is an end to that part of the case. It was also submitted, that the very disposition of the dogs themselves, their practice and habits, they having bitten other persons' cattle, ought to have been left to the jury, without further evidence, to shew that the defendant must have been aware of it. We are clearly of opinion, that in this respect there was no case to go to the jury; so the learned Judge thought, and we concur in that opinion. *It was again submitted that there was an offer on the part of the defendant (and which was proved on the trial) of a compromise, after the plaintiff's cattle had been bitten, in which the defendant said he would settle with the plaintiff for the cattle which had been killed. The witness said, "I told him his dogs had killed three of the plaintiff's cattle, when he said, if they had done it he would settle for it." It was argued that this ought to have been allowed to go to the consideration of the jury; that the ready admission, that, if the dogs had been guilty of inflicting this injury, he would settle for it, was an acknowledgment that he knew he was liable in point of law for any damage done on account of their savage disposition; and that appears to the Court to be a position which ought, strictly speaking, to have been submitted to the jury. But upon looking at the terms in which the learned Judge has referred the question to the consideration of the Court, a doubt occurred to us whether the point was ever sufficiently brought to the attention of the Judge, or whether he was called upon to leave that as a question for the jury. The words in which the learned Judge makes his report are these: "I thought there should be some proof of the defendant's knowledge of the mischievous nature of the dogs at the time of the mischief, and the question is, whether there was any such knowledge. Here *Mr. Chilton* contended, that knowledge might be inferred from the acts of the dogs. I thought otherwise, directed a nonsuit, and gave him leave to move." It is clear from the Judge's notes that the question has not been left to the jury, whether the offer of compromise was not an admission of his liability; and the learned Judge who tried the cause informs us, that he has no recollection of being called on to

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leave it to the jury. Now, certainly, the Court think, strictly speaking, and we all concur in that opinion, that the evidence ought to have been submitted to the jury; but that it ought to have been submitted to them with a *strong observation in favour of the defendant. Lord ELLENBOROUGH thought it entitled to so little weight, that he refused to leave it to a jury. But though we think, strictly speaking, it is a fact to go to the jury, yet it ought to have little or no weight at all with them, for the offer may have been made from motives of charity, without any admission of liability at all. We think, therefore, that we cannot in this case direct a verdict for the plaintiff; and it seems to us that we ought not to send the case down to a new trial, when the fact, if it had been submitted to the jury, ought to have been submitted with such strong observations as to make it very improbable that they would find for the plaintiff. We therefore think that the nonsuit ought not to be disturbed.

Rule discharged.

1835.

*Exch. of
Pleas.*
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WRIGHT v. WOODGATE (1).

(2 Cr. M. & R. 573—579; S. C. 1 Gale, 329; Tyr. & Gr. 12.)

The meaning in law of a privileged communication is, a communication made on such an occasion as rebuts the *prima facie* inference of malice, arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact: but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it.

The defendant was the solicitor employed in an equity suit on behalf of the plaintiff, a minor. The plaintiff was desirous of changing his solicitor, and informed the defendant of it. The defendant thereupon wrote a letter to the plaintiff's next friend (who was liable for the costs of the suit), dissuading him from giving any directions in the matter, and alleging, among other observations on the plaintiff's conduct, that a civil engineer, to whom the plaintiff had been apprenticed, had made him a present of his indentures, because he was worse than useless in his office: Held, that this was a privileged communication.

THIS was an action for a libel contained in a letter written by the defendant, one of the firm of Messrs. Currie, Horne, and

(1) See the same principle applied in the judgment of the Judicial Committee of the Privy Council in

Laughton v. Bishop of Sodor and Man (1872) L. R. 4 P. C. 495; 42 L. J. P. C. 11.—R. C.

Woodgate, solicitors, in Lincoln's Inn, to a Mr. Byrom, an attorney at Liverpool, under the circumstances hereafter stated. The defendant pleaded, first, not guilty; secondly, as to the parts of the alleged libel which, in the copy of the letter hereafter set forth, are included within brackets, a justification of their truth. At the trial before Lord Abinger, C. B., at the London sittings after Trinity Term, the following appeared to be the circumstances of the case.

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The plaintiff, in the year 1816, being then an infant, became entitled, under the will of his grandfather, to personal property to the amount of about 500*l*. In the same year a bill was filed in Chancery, in the name of the plaintiff, by one Whitley, his next friend, to establish the trusts of the will. Whitley died soon afterwards, and an order was made substituting Byrom as the plaintiff's next friend; and, on the death of the plaintiff's father, in 1827, another order was made, appointing a Mr. Jackson his guardian. Other proceedings took place in the suit down to the month of November, 1834, all of which were conducted, on the part of the plaintiff, by Messrs. Currie, Horne, and Woodgate. At that time the plaintiff, who was then within a few months of attaining his majority, became dissatisfied with their conduct in the management of the suit, and applied to his guardian to take the business out of their hands. He consented to do so, and the plaintiff accordingly intimated to Mr. Woodgate, the defendant, *that the suit would thenceforth be conducted on his behalf by other solicitors. On the same day the defendant wrote and sent to Mr. Byrom the letter which was the subject of the present action, and which was as follows :

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“ Wright v. Hamerton.

“ DEAR SIR,

“ At the time you were concerned for this infant, you were named in the pleadings as his next friend, and your name still continues thereon. Just before the last Vacation the cause came on to be heard on further directions, when it was supposed the Court would decide what interest the infant took under the will; but the MASTER OF THE ROLLS directed the hearing on this point to stand over until the infant should attain his majority, which will be some time in the course of next year. The infant has

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been with us this morning, endeavouring to persuade us to apply to the Master to open all the accounts of the receiver, on the ground that the maintenance money, stated to have been paid him, has not in fact been paid him. This we have refused to do, as the accounts have been long since passed, and all payments duly and properly vouched. Mr. Wright has taken himself off in great dudgeon, with a view to instruct some other solicitor to act for him, and has since sent word that he finds he must obtain some direction from you, since you have been named his next friend. Without looking more into the case than we have time at the present moment to do, we know not if any direction will be necessary from you, but we are inclined to think not, since he has a guardian, a Mr. Jackson, (lately become his father-in-law), regularly appointed by the Court. There is something due to us for costs. Should any application be made to you, probably you will oblige us by declining to interfere, at all events until our costs are paid. You are acquainted with the disposition of Mr. Wright, and therefore

[*575] will not be surprised to hear he is seeking a quarrel *with us. When we are paid, he is at liberty, with his guardian, to take his business where he pleases.

“At present there is nothing doing in the suit but the passing of the receiver’s accounts. [Some little time since, he was apprenticed to a most respectable surveyor and civil engineer, but we understand his master has made him a present of his indentures, because he was worse than useless in his office.] [He is under terms to make a settlement on his wife on his coming of age, and because we tell him we are bound to the Court to see a settlement made according to its order, he wishes us to be no longer employed, that he may, we think, avoid the order;] and, before the question as to the will can be determined, it must be ascertained whether or not his father made a will. This is an inquiry he cannot bear to have named to him; and the more particularly so, since he is told an attested copy of a will is in the possession of his aunt or sister. He considers his father as having died intestate, and treats himself as heir-at-law. For all that we have done for him since we were employed, we have taken the directions of his guardian, and we think you

cannot do better than refer him to the same quarter, should any application be made to you. With many apologies for troubling you with this long statement, we are, dear sir, yours faithfully,

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“CURRIE, HORNE, AND WOODGATE.

“HENRY BYROM, Esq., Liverpool.”

Mr. Byrom proved the receipt of the letter by the post, and that he transmitted a copy of it to Mr. Jackson.

Erle, for the defendant (no evidence being offered in support of the pleas of justification), submitted that the plaintiff ought to be nonsuited, the letter being, under the circumstances, a confidential and privileged communication. The LORD CHIEF BARON expressed his opinion that *the whole of it was privileged, except the sentence relating to the plaintiff's conduct as an apprentice, which he thought unnecessary for the purpose of the letter. *Erle* then addressed the jury, and contended that that portion of it also was protected, inasmuch as it was important to Mr. Byrom to know the plaintiff's character and disposition, in order that he might be put upon his guard, and protect himself from incurring costs on his account. His Lordship thereupon intimated his concurrence in that view of the case, and expressed his intention to nonsuit the plaintiff, unless the master, with whom the plaintiff had served as an apprentice, were called to disprove the imputation as to the plaintiff's conduct in his service. The master, a Mr. Kennett, was accordingly called, and his evidence went to shew that, although the plaintiff had been of but little use in his office, he had not been guilty of any positive disobedience or misconduct. The LORD CHIEF BARON left it to the jury to say whether the sentence relating to the plaintiff as an apprentice, was inserted with an intention to prejudice the plaintiff, and as an imputation on his moral character, or whether it was written without any malice; in the latter case he directed them to find for the defendant. A verdict having been found for the defendant—

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Sir F. Pollock now moved for a rule *nisi* for a new trial, or, at all events, to enter a nonsuit instead of a verdict for the defendant. He contended that the plaintiff ought, under the

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circumstances, to be considered in the same situation as if he had submitted to a nonsuit; and that such nonsuit could not have been supported in law, inasmuch as he had a right to have the letter itself submitted to the consideration of the jury, that they might pronounce whether it bore evidence of malice on the face of it; since in that case it would not *be protected, whatever were the circumstances under which it was written. He urged that several passages of the letter conveyed wanton and unjustifiable imputations, and that its evident object was not to caution or protect Mr. Byrom, but merely to prejudice him against the plaintiff, and induce him not to do any act in concurrence with his wishes until the defendant had got a settlement of his costs: that this being a voluntary communication, and not in answer to any inquiry from Byrom, it must be shewn not only to have been made *bonâ fide*, but also to be true, in order to justify the imputations contained in it. At all events, he submitted that the plaintiff ought, in fairness, to be placed in the same situation as if he had consented to be nonsuited, and to have the option of laying the case before another jury: and also that the two last issues ought to be entered for the plaintiff, no evidence having been given in support of the justification pleaded.

PARKE, B.:

The application to alter the entry of the verdict may be made at Chambers, when, if the statement now made be not opposed, the amendment will be a matter of course. But *Sir F. Pollock* has failed to satisfy me that there is any ground for granting a new trial. I entirely concur in the latter opinion expressed by my Lord ABINGER at the trial. The term "privileged communication," as it was applied in this case, is not, perhaps, quite a correct expression. The proper meaning of a privileged communication is only this; that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the

communication was made. In the present case *it became, in my opinion, incumbent upon the plaintiff to shew malice in fact. This he might have made out, either from the language of the letter itself, or by extrinsic evidence, as by proof of the conduct or expressions of the defendant, shewing that he was actuated by a motive of personal ill-will. If Lord ABINGER had meant to say that it was incumbent on the plaintiff to make it out by extrinsic evidence only, and that the jury could not look at the letter at all for the purpose of drawing such a conclusion, then I think that would certainly have been a wrong direction. But if he meant only that it was of no use to the plaintiff that the evidence, as it stood, should go to the jury, inasmuch as the verdict must be against him, in that opinion I entirely agree. The plaintiff's counsel did not ask for any explanation of the expression used by his Lordship, or desire that he should leave the evidence, as it stood, to the jury: not having chosen to do so, they must abide the consequences. Had such an application been made, the learned Judge must have left the case to the jury; but it would probably have been—at least I should have so left it—with very strong observations in favour of this being a *bona fide* communication. I think, therefore, that there should be no new trial.

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ALDERSON, B.:

I am of the same opinion. Ultimately the case comes to the same thing as if the learned Judge had decided in the first instance that this was a privileged communication, and that the *onus* of shewing malice was thrown upon the plaintiff. The term “nonsuiting” is not to be construed so strictly as to have been intended to exclude the letter altogether from the consideration of the jury, but only as intimating an opinion that the jury could not reasonably act upon it in favour of the plaintiff.

GURNEY, B.:

I think, from the contents of this letter, *that it was absolutely incumbent on the plaintiff to shew malice in fact.

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LORD ABINGER, C. B. :

If I entertained any doubt in this case, I should be most anxious, under the circumstances, to grant a new trial. The distinction certainly was not at the time present to my mind, between nonsuiting the plaintiff and directing the jury to find for the defendant. Undoubtedly I was induced by the remarks which fell from *Mr. Erle* to alter my opinion as to the effect of the letter, and to consider it privileged, not only as relating to the interest of the defendant, but also as relating to that of Byrom, in order that he might know something of the character and conduct of the young man who was about to make such an application to him. I still adhere to that opinion. But I find that, in fact, I did after all leave the question to the jury, whether, under all the circumstances of the case, there was malice on the part of the defendant or not.

Rule refused.

1835.

BEES v. GEORGE AND SAMUEL WILLIAMS.

(2 Cr. M. & R. 581—584; S. C. 1 Gale, 332; Tyr. & Gr. 23.)

*Each of
Pleas.*
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The plaintiff was tenant to A. of one close; K. was tenant to B. of another close. The plaintiff and K. verbally agreed to exchange their holdings; “the plaintiff to have B.’s land, and pay K.’s rent, K. to have A.’s land, and pay plaintiff’s rent.” On the same day each took possession of the other’s land. K. undertook to communicate their bargain to C., who was the agent of both A. and B.; he did, accordingly, some days afterwards, communicate it to him, and C. expressed his concurrence: Held, that this was evidence to go to the jury of a surrender by K. to B. of his interest in B.’s close.

TRESPASS for breaking and entering a close of the plaintiff, called the Orchard, in the parish of Burrington, in the county of Somerset, forcing open the gates, and spoiling the grass, &c., and ploughing up the soil therein, and carrying away certain trees and wood of the plaintiff, cut and lying in the said close. Plea, as to all the trespasses except the carrying away of the trees and wood, that the Duke of Cleveland, before any of the said times when, &c., to wit, on the 26th March, 1835, being seised in fee of the said close in which &c., with the appurtenances, demised the same to the defendant George Williams, to hold for one year then next following; by virtue of which demise

the defendant George, afterwards, and *before any of the said times when &c., to wit, on the day and year last aforesaid, entered into the said close; wherefore the defendant George in his own right, and the defendant Samuel as his servant, and by his command, committed the several trespasses justified. And as to the carrying away of the trees, &c., the defendants pleaded that they were not the property of the plaintiff; upon which issue was joined. Replication to the first plea, that, long before the making of the demise therein alleged to have been made, to wit, on the 25th March, 1820, the said Duke of Cleveland, being seised in fee, &c., demised the said close to one John Keel, to hold for one year then next ensuing, and so from year to year, for so long a time as the said Duke and John Keel should respectively please; by virtue of which demise, the said John Keel, on the day and year last aforesaid, entered into and upon the said close, and became possessed thereof; and, being so possessed, the said John Keel afterwards, and, during the continuance of the said last-mentioned demise, to wit, on the 23rd September, 1834, demised the same to the plaintiff, to hold from the 29th September then instant, as tenant at will thereof to him the said John Keel; by virtue of which said last-mentioned demise, the plaintiff afterwards, and before &c., to wit, on the day and year last aforesaid, entered into and upon the said close, and became possessed thereof as tenant at will to the said John Keel; and that after the making of the said demise from the said Duke to Keel, and during the continuance thereof, and also after the making of the said demise from Keel to the plaintiff, and during the continuance thereof, while Keel was tenant to the Duke, and the plaintiff was so possessed thereof as such tenant to Keel, the defendants committed the trespasses complained of. Rejoinder, that, after the making of the said demise by the Duke to Keel, and whilst the Duke was seised in fee of the reversion of the said close expectant on the determination *of the said term of Keel therein, and before the making of the demise from the Duke to the said defendant George Williams, and also before any of the said times when &c., to wit, on the 19th March, 1835, all the estate, term, and interest of Keel in the said close was ended and determined by surrender thereof made by Keel to the Duke.

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Surrejoinder, that all the estate, term, and interest of Keel was not ended and determined by surrender thereof made by him to the Duke, in manner and form as in the rejoinder alleged: upon which issue was joined.

At the trial before Coleridge, J., at the last Somersetshire Assizes, Keel, being called as a witness for the plaintiff, stated on cross examination, that he being tenant from year to year to the Duke of Cleveland of the close in question, and the plaintiff being tenant from year to year to Mr. Vane, the rector of the parish of Burrington, of a piece of glebe land, and the rent of each being the same, it was verbally agreed between them, on the 23rd September, 1834, that they should exchange their respective holdings; "the plaintiff was to have the Duke's land, and pay Keel's rent, and Keel was to have the rector's land, and pay Bees's rent." On the same day, accordingly, each of them took possession of the other's land. Keel informed the plaintiff he should mention the agreement to Mr. Cockburn, who was the agent to both the Duke and Mr. Vane, and the plaintiff said, "Very well;" a few days afterwards, accordingly, Keel told Mr. Cockburn that he had exchanged with the plaintiff, and he answered that he was very glad of it. Keel had before made repeated application to Mr. Cockburn for the plaintiff's land, and Cockburn had told him he should be glad to let him have it as soon as it could be made convenient. The plaintiff continued in possession of the close in question, but no rent had yet been paid by him for it. The defendants afterwards entered under a letting by the Duke, and ploughed the land, and carried away some faggots lying *in the field; which, however, clearly appeared to be the property of a person named Plumley, and not of the plaintiff. On this evidence the learned Judge left it to the jury to say, whether there had been a surrender by Keel to the Duke of his interest in the close; and stated his opinion to be, that a sufficient assent was shewn on the part of the Duke, by his agent, to the exchange between the two tenants, to constitute a new tenancy in the plaintiff of the close in question. A verdict being found for the defendants,—

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Erle now moved for a new trial, and contended that the

facts proved did not amount to a surrender by consent of all parties. Neither of the two landlords had any communication with the plaintiff; there was no contract between him and the Duke; nothing to give the Duke a right to claim rent as against the plaintiff. The effect of the agreement was no more than to constitute the plaintiff Keel's under-tenant. The plaintiff, on this record, could not say that the Duke had demised to him. He referred to *Matthews v. Sewell* (1).

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PARKE, B. :

Cockburn may be considered as representing both the Duke and Mr. Vane in the transaction, and must be supposed to have authority to demise for both of them. Therefore, there is an assent by both the Duke and Vane; that is sufficient, according to the authority of the case you refer to, to constitute a surrender by operation of law. The effect of the transaction was to create a new demise from the Duke to the plaintiff. At all events, there was evidence to go to the jury.

The other Barons concurred.

Rule refused.

RAYMOND AND ANOTHER, EXECUTORS OF THOMAS
WALFORD, DECEASED, v. FITCH (2).

1835.

*Exch. of
Pleas.*
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(2 Cr. M. & R. 588—600; S. C. 5 Tyr. 985; 5 L. J. (N. S.) Ex. 45.)

An executor is entitled to sue the lessee of his testator for the breach of a covenant not to fell, stub up, lop, or top timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator.

COVENANT. The declaration stated, that whereas theretofore, to wit, on 5th December, 1832, by a certain indenture then made between the said Thomas Walford of the one part, and the defendant of the other part, (*profert in curiam*), the said Thomas Walford, for the considerations therein mentioned, did demise and to farm let unto the said defendant, certain buildings, lands, hereditaments, and premises, particularly mentioned and described

(1) 2 Mod. 262; 8 Taunt. 970. 12 M. & W. 718.
(2) Foll. *Ricketts v. Weaver* (1844)

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in the said indenture, except as in the said indenture was excepted, to have and to hold the said buildings, lands, hereditaments, and premises, with their appurtenances, unto the said defendant, his executors and administrators, for the term of one whole year from the 29th day of September then last, and so from thence from year to year, &c. ; and the said defendant, for himself, his executors, and administrators, did by the said indenture, covenant, promise, *and agree, to and with the said Thomas Walford, his heirs and assigns, amongst other things, that the said defendant should not nor would, during the continuance of the said demise, fell, stub up, head, lop, or top any of the timber trees, or trees likely to be timber, growing or being on the said demised premises ; or cut or take away wood or bushes, lops or tops, except such as had been agreed to be allowed for fire wood ; and upon lopping the pollard trees, and cutting down the stub wood and bushes growing in or about the said hedges and ditches of the said demised premises, should at the same time new make and scour the said ditches, and lay one spit of all the earth of the said ditches on the banks thereof, to nourish the quickset there ; as in and by the said indenture, reference being thereunto had, will more fully appear. By virtue of which said demise, the said defendant afterwards, to wit, on &c., and in the lifetime of the said Thomas Walford, entered into the said demised premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof demised as aforesaid. And although the said Thomas Walford, in his lifetime, always from the time of making the said indenture, until the day of his death, and the said plaintiffs as executors as aforesaid since his death, have and each of them hath well and truly performed, fulfilled, and kept all things in the said indenture contained, on his and their part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning of the said indenture ; yet, protesting that the said defendant hath not performed, fulfilled, or kept any thing in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent, and meaning of the said indenture ; in fact, the said plaintiffs, executors as aforesaid, say that the said defendant, after the making of the

said indenture, and during the term thereby granted, and before *the decease of the said Thomas Walford, to wit, on the 1st day of January, 1832, and on divers other days and times between that day and the day of the decease of the said Thomas Walford, felled, stubbed up, headed, lopped and topped divers, to wit, 500 of the timber trees, and 500 trees likely to be timber, growing and being on the said demised premises, and of great value, to wit, of the value of 20*l.*; and during the time aforesaid, he the said defendant cut and took away divers, to wit, 500 cart loads of wood, bushes, lops and tops of a certain other great value, to wit, of the value of other 20*l.*, the same being other and different wood, bushes, lops and tops, than such as had been agreed to be allowed for firewood; contrary to the form and effect of the said indenture, and of the covenant of the said defendant so by him made in such behalf as aforesaid. And the said plaintiffs, executors as aforesaid, in fact further say, that the said defendant did not nor would, upon such lopping the said trees and cutting down the said wood and bushes growing in and about the hedges and ditches of the said demised premises, new make or scour the said ditches, or lay one spit of all the earth of the said ditches on the banks thereof, to nourish the quickset there, according to the tenor and effect of the said indenture, and of the said covenant of the said defendant so by him made in such behalf as aforesaid, but therein wholly failed and made default; contrary to the form and effect of the said indenture, and of the said covenant of the said defendant so by him made in such behalf as aforesaid.

After setting out the deed on *oyer*, the defendant, as to the breach of covenant first above assigned, excepting so much thereof as relates to taking away the said bushes, wood, lops and tops therein mentioned, demurred generally; and, to the part excepted, pleaded accord and satisfaction; and also as a further plea, that he did not take *away any wood or bushes, &c. He also demurred generally to the second breach.

Sir W. W. Follett, in support of the demurrer:

An executor cannot maintain any action for a damage to the real estate, unless it be shewn that the damage to the real estate

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has created a damage to the personal estate of the testator. That was so laid down in *Kingdon v. Nottle* (1). There the plaintiff, as executrix, declared that the defendant, by deed, conveying to the plaintiff's testator certain lands in fee, subject to redemption on payment of a sum certain, covenanted with the testator that he was at the time of the execution of the deed, seised in fee, and had a right to convey &c.; and assigned for breach, that the defendant was not seised &c., and had not a right to convey &c. Upon special demurrer, this was held ill; and that the executrix could not maintain an action for such breaches of covenant, without shewing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises. Lord ELLENBOROUGH there says, "in the absence of any damage to the testator, which, if recovered, would properly form part of his personal assets, I do not know how to say that this action is maintainable." So that, in order to entitle the executors to sue, they must shew that some damage arose to the personal estate of the testator, which in this case they have not done. In Fitzherbert's *Natura Brevium*, 145, C. it is thus laid down: "If a man make a covenant by deed to another and his heirs, to enfeof him and his heirs of the manor of D.; now if he will not do it, and he to whom the covenant is made dieth, his heir shall have a writ of covenant upon that deed." So, in Sheppard's *Touchstone*, 171, it is said, "If a feoffment be made in fee, and the *feoffor doth covenant to warrant the lands, or otherwise, to the feoffee and his heirs, in this case the heir of the feoffee shall take advantage of this." And again: "If A., B., and C., have lands in coparcenary, and purchase other lands in fee, and covenant each to the other, his heirs and assigns, to make such a conveyance to the heir of him that shall die first, of a third part, as he shall devise; in this case the heir, not the executor, shall take advantage of the covenant." That shews that the right to sue for a breach of covenant affecting the realty goes to the heir, and not to the executor. It is true that here the plaintiffs have averred that the trees were taken away in the lifetime of the testator, but on that an issue in fact is taken. The only question in issue on this demurrer is, as to the cutting of

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the trees. If this action will lie at the suit of the heir, the executor cannot be allowed to sue as well as the heir. In *Chamberlain v. Williamson* (1), it was held that an administrator cannot have an action for a breach of promise of marriage to the intestate, where no special damage is alleged. There Lord ELLENBOROUGH, in delivering the judgment of the Court, says, "The general rule of law is, *actio personalis moritur cum personâ*, under which are included all actions for injuries merely personal. Executors and administrators are representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record, otherwise the Court cannot intend it."

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(PARKE, B. : There is a case expressly in point that the action will lie: *Morley v. Polhill* (2); which was an action of covenant by the plaintiff as executor to George Morley, late Bishop of Winchester; and the declaration stated that Brian, the predecessor of the Bishop, had demised *a rectory and certain lands to J. S., for twenty-one years, who had assigned it to the defendant's testator; and that the lessee covenanted with Brian and his successors to repair the chapel of the church, and the barns, &c., and assigned as a breach the not repairing by the testator of the defendant in the life of George Morley; and that the lease afterwards expired; and it was held, that the executor was there well entitled to the action for the breach in the testator's time.)

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That case is distinguishable, as there was there a covenant to repair.

(PARKE, B. : Is there not a covenant to repair in this case?)

There is here a separate demurrer to each of the breaches; and one question is, whether an executor can maintain any action at all for a breach of covenant not to cut trees incurred in the lifetime of the testator. In Com. Dig. Administration, B. 13, it is said,

(1) 15 B. R. 295 (2 M. & S. 408).

(2) 2 Vent. 56.

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that an administrator "shall have covenant, upon a covenant made to his testator for a personal thing: so upon a contract made to the testator;" and March, pl. 23, is cited. The maxim, that *actio personalis moritur cum personâ*, applies equally to an action of contract as to an action of tort—that maxim is a maxim of the common law. Unless the personal estate of the testator is injured, the executor cannot maintain the action. *Jones v. King* (1) shews that this action is maintainable by the heir. The plaintiffs, at all events, should have averred damage to the personal property of the testator, as was done in *Knights v. Quarles* (2). In *Orme v. Broughton* (3) it was held, that, a vendor having omitted to make out a good title within the stipulated time, and the vendee having died, his executor might sue for damage incurred by loss of interest on the deposit money, and the expense of investigating the title. There it was argued, that as there was no damage done to the heir, he could not sue, and that sufficient damage had accrued to the personal property of the [*594] intestate to entitle his administrator to sue; and TINDAL, Ch. J., says, "The only question is, whether we can see on this record a personal contract, a breach of it in the lifetime of the intestate, and a loss to his personal property." All these three things must concur together, to render the action maintainable. He afterwards says, "This, however, is an action not by the intestate, but by his administrator; and we have still to see whether there has been any injury to the testator's personal property;" and then he refers to the statement in the declaration, that, "the intestate was necessarily put to great expenses in endeavouring to procure the said title as aforesaid," &c. This declaration cannot be supported, as it has not any allegation of special damage to the personal estate of the testator. *Lucy v. Levington* (4) may be cited as an authority that this action will lie; but there the declaration alleged an eviction of the testator, and it is therefore distinguishable, because the personal estate of the testator must necessarily have been injured by the loss of the rent and profits of the land. The same answer may be given to

(1) 15 R. R. 539 (4 M. & S. 188).

(3) 38 R. R. 544 (10 Bing. 533;

(2) 22 R. R. 659 (2 Brod. & B. 4 Moore & Scott, 417).
102; 4 Moore, 532).

(4) 2 Lev. 26.

Morley v. Polhill (1), as it was necessarily an injury to the personal estate. If not, that case is not law.

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(PARKE, B. : It may have proceeded on the ground that the executors of the Bishop would be liable for the breach of covenant, and so there would be a damage to the personal estate.)

The first breach here is the cutting of trees; but there is no averment of any damage to the testator. The plaintiffs ought to have given the defendant an opportunity of taking issue upon and denying such an allegation. The second breach is, that the defendant did not new make and scour the ditches; but that is clearly a covenant to do something for the benefit of the real estate, and therefore the heir, and not the executor, would be the party entitled to sue.

W. H. Watson, contra :

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It is material in this case to observe, that if the present action is not maintainable, no other action would be maintainable at the suit of any other person. It is submitted, however, that this action can well be supported. Wherever there is a covenant in a lease, and an ultimate breach of it in the lifetime of the testator, an action is maintainable at the suit of an executor. There is here a damage to the personal estate. The case of *Morley v. Polhill* is also stated in 3 Salkeld, 109. In that case the demise was by a prior Bishop, and the dilapidations were not owing to the act of the executor's testator; and it is by no means clear that his executor would be liable to the Bishop's successor. The reason given is, that the breach occurred in the testator's lifetime. It is said in Com. Dig. Covenant, (B 1), "So if he covenants with a Bishop and his successors to repair a rectory demised, the executor of the Bishop may have covenant for a breach in his lifetime. R. 2 Vent. 56." In Bacon's Abr. Executors, (N), it is laid down thus: "An executor (and not heir or assignee), for a covenant broken in the lifetime of the testator, shall have an action of covenant, though it were a covenant real, which runs with the land, as he cannot of that

(1) 2 Ventr. 56.

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have an heir, &c.; and the damages shall be recovered by the executor, though not named, as he personally represents the testator." And in the margin it is stated, "that executors shall take advantage of covenants in gross." The case of *Lucy v. Levington* (1) is recognised in all the authorities. There the plaintiff declared, "that Levington sold to Lucy, the plaintiff's testator, certain lands, and covenanted with him, his heirs, and assigns, that he should enjoy the same against him, Levington, and Sir Peter Vanlore, their heirs and assigns, and all claiming under them; and assigned as a breach that Cooke, claiming under Vanlore, ejected him." *And it was held, "that the eviction being to the testator, he cannot have an heir or assignee of this land, and so the damages belong to the executors, though not named in the covenant, for they represent the person of the testator." So here there was a destruction of the trees in the lifetime of the testator, and the damage redounded to the executors on his death. In *Chamberlain v. Williamson* (2), Lord ELLENBOROUGH puts it throughout on its being a personal wrong. In *Kingdon v. Nottle*, there was a continuing breach of the covenant in the time of the devisee, and therefore the action was held maintainable. Here, if the executor cannot maintain the action, no other person can. The question is, was the ultimate damage in the lifetime of the testator? If that distinction is observed, it will reconcile all the cases. Where the ultimate damage arises in the lifetime of the testator, the action is maintainable by the executor.

Cur. adv. vult.

The judgment of the COURT was now delivered by—

LORD ABINGER, C. B. :

The demurrer to the first breach gives rise to this question, whether an executor can sue for the breach of this covenant, not to fell, stub up, head, lop or top, timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator; and no part of the timber, loppings or toppings, appearing to have been removed by the defendant. This question

(1) 2 Lev. 26; *S. C.* 1 Ventr. 175; (2) 15 R. B. 295 (2 M. & S. 408).
2 Keble, 831.

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was argued in the latter part of the last Term, before my brothers Parke, Bolland, Gurney, and myself, and stood over, that we might more attentively consider how far the modern decisions, referred to on the argument, had overruled or qualified the old authorities. Those authorities are uniform, that the present representative *may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants, and indeed all contracts with the testator, broken in his lifetime; and the reason appears to be, that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. And this right does not depend on the equity of the statute, 4 Edw. III. c. 7, but is a common law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's lifetime. The maxim, that "*actio personalis moritur cum personâ*," is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law. These authorities as to actions of covenant will be found in Com. Dig. Administrator, B 13, Covenant, B 1; Bacon's Abridgment, Executors and Administrators, N; and in the cases of *Mason v. Dixon*, Sir William Jones, 173; *Morley v. Polhill* (1), which was the case of an action by the executor of a deceased Bishop for a breach in his lifetime of a covenant to repair in a former Bishop's lease; *Smith v. Simonds* (2), in which an administrator *de bonis non* recovered on a breach in the time of the testator for not discharging the land from incumbrance; and lastly, *Lucy v. Levington* (3), where the executor recovered for a breach in his testator's life of a covenant for quiet enjoyment. The old authorities are also many, that an action will lie upon every breach of contract, though not under seal. In March, p. 9, pl. 23, Justice Jones said, "that it was agreed by the Court, in *what case soever there is a contract made to the testator

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(1) 2 Ventr. 56; 3 Salk. 109,
pl. 10.

(2) Comberbach, 64.

(3) 2 Lev. 26; 1 Ventr. 176.

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or intestate, or any thing which ariseth by contract, there an action will lie for the executor or administrator; but personal actions die with the testator or intestate." And in 9th Reports, 89 a, *Pinchon's* case, in which the question was, whether an action of assumpsit for payment of a debt lay against an executor, it is laid down as follows: "As to the other objection, that this personal action of trespass on the case *moritur cum personâ*, although it is termed trespass, in respect that the breach of promise is alleged to be mixed with fraud and deceit, to the special prejudice of the plaintiff, and for that reason it is called trespass on the case; yet that doth not make the action so annexed to the persons of the parties, that it shall die with the persons; for then, if he to whom the promise is made dies, his executors should not have any action, which no man will affirm; and an action *sur assumpsit*, upon good consideration, without specialty, to do a thing, is no more personal, *i.e.* annexed to the person, than a covenant by specialty to do the same thing:" and in Bacon's Abr. Executors, (N), "An executor stands in the place of his testator, and represents him as to all his personal contracts, and therefore may regularly maintain any action in his right, which he himself might." These authorities have certainly been limited by the modern decisions, quoted on the argument, and are to be understood with some qualifications; but it will be found that none of those qualifications affect the present case. The rule that the executor may sue upon every covenant with his testator broken in his lifetime, has been directly qualified by the decisions in the two cases of *Kingdon v. Nottle* (1), followed by that of *King v. Jones* (2), in which cases it was held, that, where there are covenants real, that is, which run

*with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. These cases go no further, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral, and does not run with the land; for the trees being excepted from the

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(1) 14 R. R. 462 (1 M. & S. 355);
16 R. R. 379 (4 M. & S. 53).

(2) 15 R. R. 533 (5 Taunt. 518;
1 Marsh. 107; 4 M. & S. 188).

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demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor. It is a security by specialty given by the lessee to the lessor, not to commit such a trespass during the lease, which may continue beyond the lessor's life. For the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grow could not sue; the executor would be the proper party, as the covenant is collateral, and is intended not to be limited by the life of the covenantee; and if he could not sue, no one could. It is equally clear that the heir or devisee could not sue for a breach of the covenant in the time of the ancestor or deviser, and the executor therefore must sue, or all remedy is lost. These decisions, therefore, do not affect the present case. The old authorities, with respect to the right of the personal representative to sue on all contracts made with the deceased, have also been qualified by the modern decision of *Chamberlain v. Williamson* (1), in which it was held that the administrator of a woman could not sue for a breach of contract to marry the intestate, the declaration not stating any ground of injury to the personal estate; and in giving judgment Lord ELLENBOROUGH enumerates other instances of contracts, the breach of which imports a damage only to the person of the deceased, such as implied contracts by medical practitioners to use a proper portion *of skill and attention, which cases are in substance actions for injuries to the person, and for which the personal representative could not sue; and the argument on the part of the defendant in this case was, that the same limitation of the old authorities must be applied to all contracts except such as directly relate to the personal estate, and the performance of which would necessarily be a benefit, and the breach a damage, to the personal estate of the testator, whether such contracts are under seal or not; and that upon such contracts the executor could not sue without alleging a special damage to the personal estate. The case certainly does not go that length; and we think that such an extension of the doctrine laid down in it is not warranted by law, and that it cannot be extended to a contract broken in the lifetime of the deceased, the benefit

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(1) 15 R. R. 295 (2 M. & S. 408).

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of which, if it were yet unbroken, would pass to the executor as part of the personal estate; at all events, not to such a contract under seal. The present case is one of that description—it is a case more favourable to the executors than those of *Morley v. Polhill*, *Smith v. Simonds*, and *Lucy v. Levington*, in which the covenant did run with the land; and if the last case is to be considered as having been decided, as was suggested in the argument before us, on the ground that the loss of rents and profits by an eviction of the testator was an injury to the personal estate, (though such a ground is not intimated in either report), it is difficult to say that the loss of the shade and casual profits of trees is not equally so. We therefore think that our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

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(2 Cr. M. & R. 638—655; S. C. 5 Tyr. 1013; 5 L. J. (N. S.) Ex. 74.)

Devise of lands to the testator's daughter for life, remainder to her sons and daughters successively in tail; remainder to the testator's son for life, and his sons and daughters in tail: "and for default of such issue, to the younger branches of the family of B. W. and their heirs, to be equally divided amongst them, as tenants in common: and in default of such issue, to the elder branches of the family of B. W." (in the same terms). At the time of the making of the will, and of the testator's death, there were living two daughters of B. W., four daughters of one of those daughters, an only son of B. W.'s eldest son, and an only son of his third son. At the expiration of the estates tail limited to the testator's grandchildren, there were living many descendants of one of B. W.'s daughters, and of his third son.

Held, that the devise to the branches of B. W.'s family was void for uncertainty.

THIS was an action of ejectment, brought on the several demises of Charlotte Smith and Barbara Watkins, to recover certain valuable estates situate in the county of Dorset. The cause was tried at the last Dorsetshire Assizes, when a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following case; with liberty to either party to turn it into a special verdict.

George Browne, by his will, bearing date 6th of September,

1775, duly attested to pass real property, devised all his estate, including the premises which are the subject of this ejectment, (charged with a certain annuity) to his daughter Susanna Browne for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, remainder to the first and every other son of the said Susanna in tail, remainder to the daughters of the said Susanna in tail, remainder over to the testator's son, Francis John Browne for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, with remainder to the first and every other son of his said son F. J. Browne in tail, and remainder to his daughters in tail; and the will then proceeds in the following words: "and for and in default of such issue, I give and devise the said manors, messuages, farms, &c. charged and chargeable as aforesaid, unto the *younger branches of the family of Brown Willis, of Whaddon Hall in the county of Bucks, Esq., lawfully begotten, and to their heirs for ever, to be equally divided between them, share and share alike, and to take as tenants in common: and in default of such issue, I give and devise the said manors, &c. charged and chargeable as aforesaid, unto the elder branches of the family of the said Brown Willis, lawfully begotten, and to their heirs for ever, equally to be divided between them, share and share alike, and to take as tenants in common." The testator made five codicils to his will, but neither of them in any way affected the above devise. He died in January, 1777; his daughter Susanna Browne died without issue in 1783; his son F. J. Browne died without issue in March, 1833. Brown Willis had several children, both sons and daughters, and died in 1761. The only descendants of Brown Willis living at the date of the testator's will, were two daughters, namely, Mary Hervey, born in 1714, and Alice Eyre, born in 1715; and four daughters of Mary Hervey, namely, Mary Adams, born in 1750; Elizabeth Hervey, born in 1750; Charlotte Smith, one of the lessors of the plaintiff, born 1752; and Barbara Watkins, the other lessor of the plaintiff, born 1754: also John, who took the name of Fleming, born in 1749, being the only child of Thomas, the eldest son of Brown Willis; and Thomas Willis, born 1737, being the only child of Henry,

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the third son of Brown Willis. At the time of the death of the testator, in January, 1777, the same persons were living, and in addition, Jane Caroline, the daughter of Thomas, the son of Henry, the third son of Brown Willis, born in 1776. At the time of the death of the said F. J. Browne, all the above-mentioned persons were dead, except the two lessors of the plaintiff. The said John Fleming left no issue. The said Thomas, the son of Henry, third son of Brown Willis, left issue John Willis Fleming, and five daughters, viz. the said Jane *Caroline (afterwards married to Thomas Meyrick); Charlotte Caroline, born 1780; Matilda, born 1783; Harriet, born 1785; (now the wife of Henry Metcalfe Wardle); and Julia, born 1786; (late wife of Edward Orlebar Smith). The said John Willis Fleming is now living, and hath issue Houria, born 1814; John Brown Willis, born 1815; Christophina Buchanan, born 1818; Thomas James Willis, the defendant, born 1819; Harriet Elizabeth, born 1821; Charlotte Jane, born 1821; and William Henry, born 1828. The said Jane Caroline Meyrick died 1805, leaving issue Jane, now the wife of St. John Charlton, born 1803; and the said Jane Charlton hath issue, Catherine, Louisa, Jane, St. John, and Lucy. Charlotte Smith, one of the lessors of the plaintiff, hath issue, Charlotte, born 1781; Jane Maria, born 1785; Eliza Diana, born 1786; Edward Orlebar, born 1788; and Penelope Marshall, born 1793; Charles Hervey, born 1793, and Boteler Chernocke, born 1796. The said Ann Penelope Marshall hath issue, Charlotte Hervey. The said Charles Hervey, the son of the said Charlotte Smith, the lessor of the plaintiff, hath issue Charles Hervey, Frances Maria Dale, Charlotte, Julia, Elizabeth, Emma, Jemima, Barbara, and Villiers S. Chernocke. And the said Boteler Chernocke, the other son of the said Charlotte Smith, the lessor of the plaintiff, hath issue Boteler Chernocke, Charlotte Hervey, and Sarah Whitby. All the above-named descendants of Thomas, the son of Henry, the third son of Brown Willis, and of Charlotte Smith, the lessor of the plaintiff, were living at the decease of Francis John Browne. The defendant is the second son of the said John Willis Fleming, and is also devisee in fee of the premises in question under the will of the said

F. J. Browne, who was the heir-at-law of the said testator George Browne.

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The question for the opinion of the Court is, whether the lessors of the plaintiff are entitled to any and what portion of the premises in question, under the will of the said George Browne. If the Court *shall be of opinion that the lessors of the plaintiff are not entitled to any part of them, the verdict is to be entered for the defendant: on the other hand, if the Court shall be of opinion that the lessors of the plaintiff are entitled to the whole, then the verdict is to stand; if to any part, then the verdict to be entered for such part.

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[After argument, the COURT took time for consideration.]

In the ensuing Term the judgment of the COURT was delivered by—

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LORD ABINGER, C. B. [After stating the material facts of the case, his Lordship proceeded] :

The question is, whether the lessors of the plaintiff are entitled to any, and if any, what portion of the premises devised by the will of George Browne. Upon the best consideration which we can give to this question, we are of opinion that the lessors of the plaintiff take no portion of those estates. It was admitted in argument on both sides, that there is no case precisely in point, nor any in which a legal construction has been given to the words “branches of a family.” In fact, for the purpose of construing an obscure will, antecedent cases, which are not directly in point, can be of no other use than that of establishing or illustrating rules of construction. These rules being once admitted, their application to the case in question, and their effect upon it when applied, must still be open to *discussion. It was said by the counsel for the lessors of the plaintiff, that the mere difficulty of arriving at a true construction at once, is not a sufficient reason for not attempting, if possible, to find a meaning for the testator. It must be admitted, that the Court is bound to apply itself with all diligence and attention to find the meaning of the testator, if it can possibly be found, however difficult and obscure; but if, after every effort

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to find that meaning, it becomes impossible to solve the difficulty and dispel the obscurity, if no judicial certainty can be obtained of his real meaning, then the Court is not bound to supply a meaning by conjecture, or to adopt an arbitrary meaning, for the purpose of giving some effect to unmeaning or ambiguous clauses. It was also laid down by the plaintiff's counsel, that, in construing a will, the testator must be presumed to speak with reference to existing circumstances; and further, that, wherever the words of the will can bear such an interpretation, the Court should so expound them as to give a vested estate. It may be doubted whether, on a special verdict—(and this is to be turned into a special verdict)—the testator can be presumed, without an express finding by the jury, to have known the circumstances and situation of a family other than his own. Assuming, however, for the argument, that he did know the exact state of Brown Willis's family when he made his will; that is to say, that two daughters were living, one of whom had four children alive, and the other none, and that this last was past child-bearing, being, as appears by the dates, of the age of sixty; and two grandsons, one, the son of Brown Willis's eldest son, and the other the son of his third son: the question arises, what the testator meant by "the elder and younger branches of the family?" That he meant more than one person is clear, by his devising to the branches as tenants in common, and by using the words "elder branches" afterwards, in opposition to

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he must be taken to have meant them and the daughters of the elder of them then living. Now here the objection again occurs, why he should not have named the individuals, if he meant certain individuals then living and known to him. Moreover, when once it is supposed he did not mean to treat the two living sisters as the only branches, but he considered their descendants as branches also, then his not naming the living branches, which he might easily have done, if he meant to confine it to them, lets in the more natural supposition, that he meant to limit the remainder in fee to all who should be the younger branches at the time of the failure of issue of his son. And, if he meant to designate by the word "branches," not the children only, but the descendants of the children of Brown Willis, then the word would comprehend the male descendants of the third son, who might very properly be called the younger branches of the family of Brown Willis, in opposition to the descendants of the elder son, who would be the elder branches. Here, then, on the supposition that he knew the state of the family, we have open to us the following conjectures: First, he might have meant to limit the remainder *to the two sisters, Mary Hervey and Alice Eyre; secondly, he might have meant to include the daughters of Mary Hervey, then living, with their mother and aunt; thirdly, he might have meant to limit the remainder to such persons as should be living at the time of the failure of issue of his own son, and should then be considered the younger branches of Brown Willis's family; and, lastly, which is not the least probable conjecture, he might have intended to limit the remainder in fee to such of the male descendants of Brown Willis, by his third son, as should be then living. Upon one or the other of the two first suppositions only, the lessors of the plaintiff would take any vested interest. But, independently of the reasons afforded against the probability of these conjectures, we do not see why the Court should prefer either of them to the other two. The rule that words should be so expounded as to give, if they can reasonably bear the construction, a vested instead of a contingent estate, is not a rule to assist in finding out who the testator intended for the objects of his bounty; it does no more than suggest the most desirable method

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of carrying that intent into effect, when those objects are discovered, assuming that a light sufficiently certain can be thrown on the individuals, or classes, whom the testator has designated; for that rule applies thus: that the person shall take a vested, rather than a contingent interest, if the words of the will are not really and absolutely inconsistent with such an interpretation. If we cannot be satisfied the testator meant either the daughters of Brown Willis, or the existing descendants of those daughters, or such of those descendants as might thereafter exist and be alive on failure of issue of the son, this rule does not bind us to select the living among those parties, merely that the remainder might be vested, instead of contingent. Upon the whole, then, the meaning of the testator is open to several different conjectures, none of which appear to us to be of sufficient *force to justify us in adopting any of them. We are of opinion that the limitation in the will of George Browne, under which the lessors of the plaintiff claim, is void for uncertainty; and consequently the remainder in fee, after the extinction of the estate tail in the son of the testator, descended to that son as his heir-at-law. If the Court considered itself under the necessity of choosing between the several conjectures, we should be more inclined to adopt the last as the most probable; but in that case also the judgment would equally be for the defendant.

Judgment for the defendant.

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NICOLLS v. BASTARD, Esq.

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(2 CR. M. & R. 659—662; S. C. 1 Gale, 295; Tyr. & Gr. 156; 5 L. J. (N. S.) Ex. 7.)

In the case of the simple bailment of a chattel, without reward, it may be recovered in trover, either by the bailor or the bailee, if taken wrongfully out of the bailee's possession.

TROVER against the late sheriff of Devonshire, for divers cattle, goods, and chattels, to wit, thirty horses, thirty mares, thirty bulls, thirty cows, &c.; hay, corn, furniture, &c. Pleas, first, not guilty; secondly, that the cattle, goods, and chattels, in the declaration mentioned, were not, nor was any or either of them, the property of the plaintiff, in manner and form, &c.;

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thirdly, that one J. Horne was possessed of the said cattle, goods, and chattels, in the declaration mentioned, and in order to avoid an execution about to be levied upon his goods, fraudulently sold the same to the plaintiff; that a writ of execution against the goods of Horne (which was set out) being delivered to the defendant, he seized the cattle, goods and chattels, in the declaration mentioned, under such writ. Replication to the third plea, that Horne did not, for the purpose of fraudulently preventing the said cattle, goods, and chattels in the declaration mentioned from being taken in execution, sell them to the plaintiff: and issue thereon. The particular of demand comprised only "one cow." At the trial before Gurney, B., at the last Devonshire Assizes, it was proved that the plaintiff was the owner of a cow, which he had lent to Horne, to be kept in his pasture, where it was seized by the defendant under the execution. For the defence, the writ and proceedings under it were given in evidence; and it was proved that a great quantity of property was sold by auction by Horne, in order to avoid the execution, a large part of which was purchased by the plaintiff: that the plaintiff's cow was put into the catalogue, but was not sold; nor was any cow sold at all. The defendant's counsel contended, that the *plaintiff could not maintain trover for the cow, inasmuch as he had not the possession of it at the time of the seizure. The learned Judge overruled the objection, and the jury found for the plaintiff on the plea of not guilty, and that the cow was the property of the plaintiff, and had not been sold by Horne; but that the sale of Horne's goods was fraudulent. The learned Judge thereupon directed a verdict to be entered for the plaintiff on the second issue, and for the defendant on the third; but reserved leave to the plaintiff to move to enter a verdict for him on that plea also.

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Fraser having obtained a rule *nisi*, pursuant to the leave reserved—

Erle also moved, on behalf of the plaintiff, for a rule *nisi* or a new trial, in case the former rule should be made absolute;

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and renewed the objection taken at the trial. He contended, that, at the time of the seizure, the legal possession of the cow was in Horne, and that the plaintiff could not recover in trover, unless he had the legal possession of the chattel in question as well as the property; although the party having the legal possession, without the property, might: *Gordon v. Harper* (1), *Roberts v. Wyatt* (2), *Pain v. Whittaker* (3).

(PARKE, B.: I think you will find the rule is, that either the bailor or the bailee may sue, and whichever first obtains damages, it is a full satisfaction.)

This is in the nature of an action by a reversioner; whereas, according to the modern cases, trover must be brought by a party having a right to the immediate possession.

(PARKE, B.: In 2 Roll. Abr. 569, pl. 22, it is stated, that the bailor may sue in trespass; there is no distinction in this respect between trespass and trover. In the cases cited, the party had given an *interest in the chattel for money. Here, Horne was a simple bailee.)

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Rule refused.

On a subsequent day, cause was shewn against the other rule by—

Erle and W. C. Rowe :

The particular of demand may be laid out of consideration; the plaintiff's claim is to be looked at as he has stated it in his declaration. Now, the declaration comprises many different descriptions of goods; and though the claim was abandoned at the trial as to all except the cow, the defendant had a right to look to the issues on the record. The replication admits that Horne was possessed of "the cattle, goods, and chattels in the declaration mentioned," as stated in the plea; and puts in issue only the fraudulent sale. The plea collects all the articles mentioned in the declaration into one subject-matter,

(1) 4 R. R. 369 (7 T. R. 9).

(2) 11 R. R. 566 (2 Taunt. 268).

(3) Ry. & M. 99.

and predicates of them, taken collectively, that they were the goods of Horne up to the time of the sale. That statement the replication does not deny, nor that the plaintiff claimed them through the sale from Horne; then the jury have found that that sale was fraudulent.

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(PARKE, B.: You had to shew, on this replication, that Horne fraudulently sold that cow to the plaintiff. You certainly did not shew that, if it was the plaintiff's cow, and not Horne's.

ALDERSON, B.: You seem to take the admission on the record as an admission of the fact for all purposes, instead of a mere waiver of contest as to that fact.)

Whatever facts are not traversed on the record, the sheriff has a right to take as admitted.

(PARKE, B.: He stands in the same situation as if the plaintiff had protested; a protestation being no longer necessary, since the new rules. Then the issue puts it on you to shew that this individual cow was fraudulently sold; which could not be, because she was not sold at all.)

In **Barnes v. Hunt* (1), where the plea averred the identity of the trespasses, and set up a licence, it was held that the plaintiff might prove a trespass not covered by the licence.

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PARKE, B.:

You might have applied that case, if a cow had been fraudulently sold; then you might fairly have said, this is the cow, and the plaintiff ought to have new assigned. But there was no cow at all sold; it is clear, therefore, your plea was not sustained. There would have been no confusion if that had been done which ought to have been done—that is, if all the articles claimed, except the cow, had been struck out of the declaration. But when the case is properly considered, it comes just to the same thing; the effect of the particular is in substance to restrict the issue to the cow. The whole defence stated in

(1) 11 East, 451.

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the last plea would, in truth, have been admissible under the second; the plea of no property in the plaintiff, means no property as against the defendant, which the plaintiff could not have if the sale was fraudulent.

ALDERSON and GURNEY, BB., concurred.

Rule absolute.

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GREEN v. BUTTON (1).

(2 Cr. M. & R. 707—716; S. C. 1 Gale, 349; Tyr. & Gr. 118; 5 L. J. (N. S.) Ex. 81.)

A declaration in case stated that the plaintiff (a carpenter and builder) had purchased of C. certain spruce battins, to be used by him in his trade, for 11l., which sum the defendant had lent to the plaintiff for the purpose of making payment for them, and on the personal credit of the plaintiff, without any agreement that the defendant should have any lien or control over the battins as a security for its repayment; yet that the defendant, well knowing the premises, and contriving, &c., to deprive the plaintiff of the possession and use of the said battins, and falsely and wrongfully assuming and pretending that he was entitled to a lien on them, and had a right of staying and preventing the delivery of them to the plaintiff until the said sum of money should be repaid, wrongfully and maliciously, and without reasonable or probable cause, but under colour of the said pretended lien and right of detainer, directed C. not to deliver them to the plaintiff until further order from the defendant; whereby, and in consequence whereof, C. being induced to believe that the defendant had such lien, &c., did, in consequence of such order, refuse to deliver them to the plaintiff for three weeks, whereby the plaintiff was prevented from using them in his business, and certain houses which he was then building were greatly delayed, &c.: Held, on demurrer, first, that it sufficiently appeared on the face of the declaration, that the defendant made a knowingly false claim of lien; secondly, that the special damage alleged, viz. the non-delivery of the battins to the plaintiff, was sufficiently connected with the wrongful act of the defendant, to support the action.

CASE. The declaration stated that the plaintiff, before and at the time of the committing of the grievances by the defendant thereafter mentioned, used and carried on the business of a carpenter and builder, and had, just before the time of the committing, &c., to wit, on the 27th of June, 1835, purchased of

(1) Cited and distinguished in judgment of the Court delivered by BLACKBURN, J. in *Wren v. Weild* (1869) L. R. 4 Q. B. 730, 734; 38 L. J. Q. B. 327, 329, where the

action was in respect of threats by a rival patentee; and see *Halsey v. Brotherhood* (1861) 19 Ch. Div. 386; 51 L. J. Ch. 233.—R. C.

certain persons using the name, &c., of Cosser & Son, and Cosser & Son had then sold to the plaintiff, a certain large quantity of wood, to wit, 200 spruce battins, to be used by the plaintiff in his said trade or business, at and for the sum of 11*l.*, which sum the plaintiff, at the time of the said purchase and sale, paid to Cosser & Son, who then accepted and received the same from the plaintiff in payment for the said spruce battins, &c.; and the defendant, at the time of the said *purchase and sale, had lent and advanced to the plaintiff the said sum of 11*l.*, for the purpose of making such payment, of which Cosser & Son had notice; and which said sum of money was so lent and advanced by the defendant to the plaintiff as aforesaid, upon the personal credit and responsibility of the plaintiff, without any agreement being then, or at any other time, either before or afterwards, made or entered into between the plaintiff and the defendant, that the defendant should have or be entitled to any lien on the said spruce battins in respect of the said loan, or any power or control over the same, or any part thereof, as a security for the repayment of the said sum of money, or otherwise: yet the defendant, well knowing the premises, and contriving, &c., to deprive the plaintiff of the possession, use, and benefit of the said spruce battins, and falsely and wrongfully assuming and pretending that he, the defendant, had and was entitled to a lien on the said spruce battins, and had then a right of staying and preventing the delivery thereof to the plaintiff until the said sum of money should be repaid; and falsely and wrongfully pretending that the plaintiff was in embarrassed circumstances, and unable to pay his just debts; afterwards, and after the said purchase and sale of the said spruce battins by the plaintiff, and after the payment of the price thereof by the plaintiff, wrongfully and maliciously, and without reasonable or probable cause in that behalf, but under colour of the said pretended lien and right of detainer, ordered and directed the said Cosser & Son not to deliver the said battins, or any part thereof, to the plaintiff, but to retain and keep the same in their possession, until they the said Cosser & Son should receive further orders and directions from the defendant concerning the same; whereby, and in

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consequence whereof, the said Cosser & Son being then and there, by the means aforesaid, induced by the defendant to believe that he, the defendant, in fact had and was entitled to such lien as aforesaid *on the said spruce battins, and had a legal right to make such order for the staying and preventing the delivery thereof to the plaintiff, did, in pursuance of the said order and direction of the defendant in that behalf, keep and retain the said spruce battins in their custody for a long space of time, to wit, for the space of three weeks then next following, without the consent and against the will of the plaintiff, and did during all that time absolutely refuse to give up or deliver the same, or any part thereof, to the plaintiff or his order, although the said Cosser & Son were requested by the said plaintiff so to do: whereby, and by reason of the committing of the said grievances by the defendant, the plaintiff was during all that time deprived of the possession of the said spruce battins, and of the benefit of the said sale and purchase thereof, and prevented from using the same in his said trade or business of a carpenter and builder; and divers houses and buildings then erecting and building by the plaintiff, during all the time aforesaid, remained incomplete, and the work and progress thereof was greatly delayed and retarded, &c. &c.

Several pleas were pleaded, of which the third was, that the plaintiff did not pay the said price or sum, or any part thereof, to the said Cosser & Son, in manner and form, &c.: concluding to the country. General demurrer, and joinder.

The points marked for argument in the margin of the demurrer book were as follows: On the part of the plaintiff—that the non-payment by the plaintiff of the price of the spruce battins, mentioned in the declaration, to Cosser & Son, is no justification in law for the grievances alleged to have been committed by the defendant. On the part of the defendant—That on the pleadings it does not appear that there is either wrong or damage sufficient to support the action; the wrong alleged being the ordering Cosser & Son not to deliver the goods to the plaintiff until *further orders; but no legal obligation to obey that order appearing, and the expression of a wish to that effect not being actionable, Cosser & Son would be alone liable if they retained

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the goods without legal right. No misrepresentation is alleged as the ground of action; and if any assertion of a right to prevent the delivery of the goods can be implied, it would not sustain an action, being only the expression of an opinion not alleged to be to the defendant's knowledge erroneous, and on which, if erroneous, it was the indiscretion of Cosser & Son to rely. No sufficient damage appears; for the plaintiff was not entitled by law to the delivery of the goods till the price was paid, and the plea denies that he paid the price; and there is nothing to shew that Cosser & Son would have delivered the goods even if no order or direction had been given.

Wightman, for the plaintiff:

The plea is clearly bad: but the main question is, whether the declaration discloses a sufficient cause of action, the averment of the payment of the price being struck out. It is submitted that the damage is sufficiently shewn to have been the necessary consequence of the defendant's wrongful act, to enable the Court to hold that the plaintiff is entitled to some damages, to be afterwards ascertained in amount. *Vicars v. Wilcocks* (1), which will be relied on by the other side, is distinguishable, because there was no necessary connection between the slander uttered by the defendant, and the wrongful act of the party who was supposed to have been induced by it to dismiss the plaintiff from his service. The rule of law is laid down correctly by TINDAL, Ch. J., in *Ward v. Weeks* (2): "Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original *uttering of the words. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage." So here, if some third party had informed Cosser & Son that the defendant had a lien on the battins, and they had thereupon refused to deliver them, this case would have been within the rule so laid down: but it is the

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(1) 9 R. R. 361 (8 East, 1).

(2) 7 Bing. 215; 4 Moore & Payne, 796.

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defendant himself who directly forbids their delivery, stating that he has a lien. And he might have some right arising out of a special contract, though not strictly a lien, which might render it unsafe for Cosser & Son to deliver them to the plaintiff. In *Plunket v. Gilmore* (1), it was held that case lay by a vintner against a party who procured men to come to the plaintiff's house, one of them dressed in women's clothes and pretending to be a prostitute, and to call out "a bawdy-house," so as to have the plaintiff's house reputed as such, by which the mob broke the windows: for these acts would have been evidence to convict the plaintiff on a charge of keeping a disorderly house. Here it is admitted on the pleadings, that the plaintiff has been unable to obtain his goods from Cosser & Son by reason of the defendant's unfounded representation of a lien, and forbidding them to deliver them. It is like a case of slander of title, where it is necessary to shew that the defendant had good grounds for saying what he did. The plaintiff would have had the goods he had purchased but for the defendant's wrongful and voluntary act, which has directly prejudiced him.

J. Henderson, contra :

[*712] Nothing appears on the face of this declaration to shew that the defendant was not acting in the assertion of a *bonâ fide* claim of lien. If he was, *the action cannot be maintained: *Gerrard v. Dickinson* (2). The assertion of a *bonâ fide* title, unless it appears to have been wrongful and malicious, gives no right of action.

(PARKE, B.: It is stated to have been so here.)

It is not directly alleged; the plaintiff only sets forth certain facts from which he invites the Court to draw that inference. It is stated that the defendant had in fact no lien by agreement with the plaintiff, and that he knew the facts alleged; but not that he knew there was no foundation for his claim of lien. That being so, the defendant's representation is fairly referable to a *bonâ fide* belief that he had a lien, and therefore is not actionable. The assertion of a lien, even without reasonable

(1) Fortesc. 211; 1 Mod. 215.

(2) 4th resolution, 4 Co. Rep. 18.

or probable cause, would not confer a right of action, unless it were fraudulently made.

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(PARKE, B. : It is said here to have been done maliciously.)

The mere allegation of a malicious intent will not give the act an actionable character: *Haycraft v. Creasy* (1); *Polhill v. Walter* (2); and the words "well knowing the premises" import only this—well knowing the matters of fact before stated; with which it is consistent that the defendant had a lien, or *bonâ fide* believed himself to have it.

But further, it does not even distinctly appear that the defendant asserted that he had such lien in fact: but only that he gave Cosser & Son an "order and direction" not to deliver the goods to the plaintiff. That of itself is nothing, unless it carried with it an obligation on Cosser & Son to obey it; it imports no more than a mere request. At all events, it would give no right of action, without consequential damage being shewn to have been the natural, necessary, or legal result of the defendant's act. In *Morris v. Langdale* (3), which was an action for saying of a stock-jobber that he was a "lame duck," *innuendo that he had not fulfilled his bargains in stock; and the special damage alleged was, that certain persons named had, in consequence of the words, refused to fulfil certain contracts of the same kind with the plaintiff—Lord ELDON, Ch. J., said this was damage for which the plaintiff might compensate himself in actions against those persons, and the law supposed that in such actions he would receive a full indemnity. So here, Cosser & Son were lawfully bound to deliver to the plaintiff, as the declaration assumes, and might have been sued by the plaintiff for not delivering. *Vicars v. Wilcocks* lays it down distinctly that the injury to the plaintiff, to entitle him to damages, must be the legal and natural result of the defendant's act, not the wrongful act of a third person arising out of it.

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(PARKE, B. : Considerable doubt has been thrown on that authority in a very learned work (4).)

(1) 6 R. R. 380 (2 East, 92).

(2) 37 R. R. 344 (3 B. & Ad. 114).

(3) 2 Bos. & P. 284.

(4) 1 Starkie on Libel, 205, n. See also *Knight v. Gibbs*, 40 R. R. 247 1 Ad. & El. 47; 3 Nev. & M. 467).

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Ward v. Weeks is an authority to the same effect.

(ALDERSON, B.: Those cases, in which the damage arose from the wrongful act of a third person, are perfectly distinguishable from this.)

Suppose Cosser & Son had been sued by the plaintiff, and made responsible in full damages for the non-delivery; could they have an action over against the defendant? His act is not the *causa causans* of the injury, because it imported no compulsion on Cosser & Son to withhold the goods.

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Again, it does not appear that the plaintiff is entitled to the possession of the goods, not having paid for them. If so, he cannot allege their non-delivery as a ground of legal damage. To apply the judgment of Lord ELLENBOROUGH in *Vernon v. Keys* (1), "he has not been deprived by deceitful means of any benefit which the law entitled him to demand or expect." In *Ashley v. Harrison* (2), *which was an action by a proprietor of a theatre against a person who had libelled a female singer at the theatre, by reason whereof she was deterred from appearing on the stage, it was ruled that the action was not maintainable, because it would be making the right to sue depend on whether she had nerve enough to appear in spite of the libel. So here, the result of the action is made to depend on the choice of Cosser & Son whether they will recognise the defendant's claim or not.

Wightman, in reply :

It is submitted that it quite sufficiently appears, on all the allegations of this declaration taken together, that the defendant was actuated by a malicious motive, and that his representation was false to his own knowledge. It was for the defendant to have shewn that the non-delivery was in consequence of the non-payment of the price, and not in consequence of the false representation. It is true that the plaintiff might have a ground of action against Cosser & Son, but that is no defence here. In

(1) 11 R. R. 499 (12 East, 636; (2) 3 R. R. 686 (1 Peake, 256; 4 Taunt. 488). 1 Esp. 48).

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cases of slander of title, although there is an action against the party who fails to perform his contract, there is an action also against the author of the slander: *Bac. Abr. Action on the Case*, (B.) (1).

(ALDERSON, B.: If Cosser & Son have not been paid, there may have been no breach of their contract, and therefore no right of action against them.)

At all events, their doubt as to the defendant's title, whether well or ill founded, induced by his representation, has caused them not to deliver the goods. That is an injury to the plaintiff, and it results directly from the defendant's wrongful act, and, as it must be inferred on these pleadings, from it only.

PARKE, B.:

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I think this action is maintainable, and that the demurrer must be overruled. It is in substance an action on the case for a false and malicious representation; and there is no doubt, on the authority of *Gerrard v. Dickinson*, which has been cited, and also of *Lovett v. Weller* (2), that the action is maintainable, though the defendant makes a claim of right, if it be made maliciously, and without reasonable or probable cause, and the special damage accrues from the claim so made. Then the questions here are, first, whether it sufficiently appears that the defendant made the claim falsely and maliciously; and secondly, whether the special damage appears to result from that wrongful act. [His Lordship read the material parts of the declaration, and then proceeded:] It appears to me that there is here a sufficient allegation that the defendant knew that there had been no agreement for a lien, that he falsely and wrongfully pretended that he was entitled to a lien, and made the representation from improper and malicious motives: and that if it is necessary that his claim of lien should be disproved, in order to maintain the action, that also is sufficiently averred. In considering the effect of this demurrer, we must lay out of the question the

(1) Citing *Newman v. Zachary*, (2) 1 Roll. Rep. 309. Aleyn, 3.

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averment in the declaration, of payment of the price. Then the second question is, whether the averment of special damage is sufficiently connected with the alleged wrongful act. It seems to me that there is a sufficient allegation that the false representation was the cause of the non-delivery of the goods by Cosser & Son. But it is said they were under an absolute contract to deliver to the plaintiff, and that he might take his remedy against them for the breach of that contract; and *Vicars v. Wilcocks*, and Lord ELDON's *dictum* in *Morris v. Langdale*, are cited to shew that the plaintiff's right of action against them bars him from recovering against the defendant. It is unnecessary to *consider how far those cases would be supported, if the same question arose directly; if it did, we should desire time to give them a full consideration, some doubt having been thrown upon their authority; but in order to raise that question, we must import into the declaration an allegation that Cosser & Son were under such absolute obligation to deliver; whereas, the averment of payment being struck out, nothing like an obligation to deliver is to be collected from the declaration: it only appears that these were goods sold on credit, and not paid for. Then the result of the whole is, that the defendant had no reasonable or probable cause for his representation, and that there was a damage to the plaintiff resulting therefrom, viz. the non-delivery of the goods. Our judgment must therefore be for the plaintiff.

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ALDERSON, B. :

I am of the same opinion, and my brother PARKE has expressed all the reasons I can give.

GURNEY, B., concurred.

Judgment for the plaintiff.

WATERS AND ANOTHER, EXECUTORS OF WATERS,
DECEASED, v. TOMPKINS.

(2 Cr. M. & R. 723—728; S. C. Tyr. & Gr. 137; 5 L. J. (N. S.) Ex. 61.)

1835.

*Exch. of
Pleas.*

[723]

The meaning of part payment, to take a case out of the Statute of Limitations, is payment of a smaller on account of a greater sum of money, due from the party making the payment to the party to whom it is made.

The appropriation of such part payment of principal, or of payment of interest, to a particular debt, may be shewn by any medium of proof, and does not require an express declaration of the debtor, at the time of the payment, to establish it; it may therefore be proved by previous or subsequent declarations of the debtor; although the fact of the payment must be proved by independent evidence.

ASSUMPSIT on five promissory notes, one for 100*l.*, two for 50*l.* each, and two for 20*l.* each, given by the defendant to William Waters, the deceased; with counts for money lent by the deceased, interest, and on an account stated with the deceased; and also on an account stated with the plaintiffs as executors. Pleas,—as to the common counts, *non assumpsit*; as to the whole declaration, *actio non accrevit infra sex annos*, and issue thereon. At the trial before Gurney, B., at the last Bristol Assizes, the plaintiff had a verdict. A rule was obtained for a new trial, on the ground that there was no evidence to go to the jury of any payment of principal and interest on any of the notes declared on, (all of which were above six years old), so as to take the case out of the statute. Cause was *shewn by *Erle* and *Crowder*; and *Bompas*, Serjt., and *Ball*, were heard in support of the rule. The evidence and arguments are fully stated in the judgment of the Court, which was delivered on the last day of this Term, by—

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PARKE, B.:

In this case, which was tried before my brother Gurney, and was argued before us a few days ago, on shewing cause against a rule for a new trial, the question was, whether there was sufficient evidence to go to the jury to take the case out of the Statute of Limitations. The action was brought to recover the amount of five promissory notes from the defendant to the testator, due more than six years before the commencement

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of the suit; one for 100*l.*, two for 50*l.*, and two for 20*l.* each. The evidence of a promise within six years was, that the defendant, on an application made to him, said that his wife would have called on the testator, and paid him money on account of the interest on 200*l.*, but she had not called in consequence of the illness of his child; that in about a fortnight afterwards the wife called, and paid 15*s.*, without saying on what account. On another occasion, the defendant sent word to the testator, that his wife was in Wales, or she would have called with the interest; and that the wife, on other occasions, made payments to the testator, who said at the time he should be glad if the interest was more regularly paid.

This evidence was left to the jury, and the plaintiff recovered a verdict. We are of opinion that it was sufficient to warrant the verdict.

The objections to it were two:

1st. That the payments made to the testator were not sufficiently proved to be payments of interest.

2ndly. That there was no proof that they were payments of interest on the notes for which the action was brought, or any of them.

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The first of these points depends upon the construction of the 9 Geo. IV. c. 14, s. 1. [His Lordship read the clause.]

On the first perusal of this clause, it would seem that the proviso takes the case of part payment of principal, or payment of interest, out of the operation of the statute altogether; and therefore, that these facts would not only have the same effect, but might be proved exactly in the same way, that they would have been if the Act had not passed; and consequently by the defendant's parol admission, which species of proof of a simple fact is not exposed to the same degree of danger as attended the admission of acknowledgments of the debt itself. But the Court of Exchequer, in the case of *Willis v. Newham* (1), decided that the verbal acknowledgment of part payment of a debt was insufficient, and they construed the Act as containing a general provision, that in no case should an acknowledgment or promise, by words only, be sufficient to take the case out of the Statute

(1) 3 Y. & J. 518.

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of Limitations, whether such acknowledgment were of the existence of the debt, or of the fact of part payment; and they considered the proviso as leaving to the fact of part payment, if properly proved, that is, not by an acknowledgment only, the same effect which it had before the statute. And this construction of the Act certainly extends the remedy, and obviates the mischief to be guarded against, in a greater degree than the words taken in their ordinary sense would do.

But if part payment, or payment of interest, is proved in any legal mode, and not by admission only, this case is no authority that such proof is not sufficient. The Act of 9 Geo. IV., as explained by that case, does not prohibit or qualify the ordinary mode of legal proof in any respect, save that it requires something more than mere admission.

The meaning of part payment of the principal, is not the naked fact of payment of a sum of money, but payment of a smaller on account of a greater sum, due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it: and the reason why the effect of such a payment is not lessened by the Act is, that it is not a mere acknowledgment by words, but it is coupled with a fact. The same observation applies to the payment of interest. But if the payment of a sum of money is proved as a fact, and not by a mere admission, there is nothing which requires the appropriation to a particular account to be proved by an express declaration of the party making it at the time; such appropriation may be shewn by any medium of proof, and many instances might be put of full and cogent proof of such appropriation, where nothing was said at the time by the debtor; as, for example, if, the day before, the debtor had called and informed the creditor that he would, the day after, send his clerk with a specific sum on account of the larger debt than described, for which the action was brought, and should require a receipt for it, and the clerk did pay that specific sum, and took the creditor's receipt, expressly stating the account on which it was received, and delivered it to his employer; there could be no doubt that such evidence would not only be admissible, but, if distinctly .

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proved, at least as satisfactory as a declaration accompanying the act of payment. In the present case, there is evidence to the same effect, though by no means so cogent as in the instance put, but still sufficient for the consideration of the jury.

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There is evidence which is in effect this, that the defendant, before the payment, said that his wife was his agent to pay interest on a debt of 200*l.*, by his authority. There is a statement that she had been prevented from *calling before by a temporary cause, which amounts to a representation that she would soon call and pay such interest. She did call soon after, and paid a sum of money; and, on other occasions, she did pay sums, which the testator in her presence in effect treated as interest, and she acquiesced. This evidence has been properly submitted to the jury, and they have been satisfied with it. If they had not, we should by no means have disapproved of their verdict; but, on the other hand, we cannot say that it is wrong.

The other objection is, that the payment of interest is not sufficiently connected with the debt on which the action was brought. We agree that there must be reasonable evidence of the identity of the debt on which the interest was paid with that sued for; but we are clearly of opinion that there was sufficient in the case. There is the defendant's statement that interest was to be paid, and on a debt of 200*l.* bearing interest; and the two notes for 50*l.*, and the one for 100*l.*, on which the action is brought, agree with that description; and there is no proof or suggestion of any other transaction between the parties to which such a description will apply, for it is clearly inapplicable to the other claim of 40*l.* on two notes (1). The case by no means resembles that of *Holme v. Green* (2), in which the only proof was the simple fact of payment of a sum of money by one of two debtors, without any proof whatever of its being paid on account of any debt due from both; still less of its

(1) It appeared that the 40*l.* was due for money lent to the defendant by one Ann Flower, who, by her will, of which the testator Waters was executor, had bequeathed it to another Ann Flower, an aunt of the

witnesses who deposed to the conversations in question; and that the occasion of their applying to the defendant was, to receive the interest on that sum of 40*l.*

(2) 1 Stark. 488.

having been paid on account of a greater *debt, so as to amount to an acknowledgment or promise to pay that greater debt.

We therefore, think that the rule for a new trial must be discharged.

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Rule discharged.

DOE D. STRODE v. SEATON AND OTHERS (1).

(2 Cr. M. & R. 728—732; S. C. 1 Gale, 303; Tyr. & Gr. 19; 5 L. J. (N. S.) Ex. 73.)

1835.
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Pleas.*
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A lessee for years covenanted to pay the rent to the lessor, his heirs and assigns, and also to deliver up possession of the demised premises at the expiration of the term, to the lessor, his heirs and assigns. In an action of ejectment brought by the devisee of the lessor against the assignee of the lessee, after the expiration of the term, to recover possession of the premises: Held, that the assignee was not estopped by such covenant from shewing that the lessor was only tenant for life of the premises demised.

A judgment recovered by the defendant in a former ejectment, is admissible in evidence against the lessor of the plaintiff on the trial of a second ejectment, where the lessor of the plaintiff and the defendant are the same parties.

EJECTMENT to recover certain messuages, &c., in the city of Bristol. The cause was tried before Gurney, B., at the last Bristol Assizes, when it appeared that the lessor of the plaintiff claimed under the will of Colonel John Strode, dated the 31st of March, 1806, whereby the said John Strode (who then held the property now in dispute), devised all his manors and other messuages, lands, &c., whereof he was then seised or in possession for any estate of inheritance or freehold, to the use of his nephew Thomas Chetham, for life; remainders to the first and other sons, and to the daughters of the said Thomas Chetham; remainder to the testator's nephew Richard Chetham for life, with like remainders; remainder to the use of the testator's nephew Randle Chetham (who afterwards took the name of Strode, and was the lessor of the plaintiff) for life, with remainders over. Col. John Strode died in possession of the property in question, and without issue, in December, 1807. Thomas Chetham (then Thomas Chetham Strode) entered

(1) The former ejectment between the same parties is reported p. 12, *ante* (2 Ad. & El. 171).—R. C.

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into receipt of the rents, and died without issue, in September, 1827; and Richard Chetham (then Richard Chetham Strode), also died without issue, in August, 1828. The defendants were the devisees in trust under the will of John Weeks. It appeared *that Col. John Strode had, in the year 1796, granted a lease of the premises in question to one Samuel Thomas, for twenty-one years, at an annual rent. Thomas died in the year 1800, leaving an only daughter, who took out letters of administration, sold and conveyed the estate to one John Hall, who, in 1802, conveyed his interest to Weeks, who took possession, and regularly paid rent until and for some time after the death of Col. John Strode. At the trial, the assignment of the lease having been called for, it was produced by the defendants. It recited the covenant in the original lease to pay the rent to Col. John Strode, his heirs and assigns, and to deliver up possession to him, his heirs and assigns. That having been read, it was contended on the part of the lessor of the plaintiff, that the defendants were not at liberty to shew that Col. Strode was not seised in fee but had only an estate for life, and that the defendants were in the situation of tenants, who are not allowed to dispute the title of their landlord. The learned Judge, however, decided that the estoppel did not apply to these defendants. The defendants then adduced evidence to shew that the property in question had formerly belonged to James Strode, an uncle of Col. Strode's, who died in 1749, and under whose will Col. Strode was only entitled to a life estate, and that upon his dying without issue, the estate in question descended to the said Thomas Chetham Strode, his nephew, who by indentures of lease and release, dated September, 1813, for a valuable consideration, conveyed the premises to Weeks in fee. They also put in evidence the record of the judgment, and the particulars of the premises in a former ejectment brought against them by the lessor of the plaintiff to recover the same premises. This evidence was also objected to as inadmissible, but the learned Judge overruled the objection. The jury found that Col. John Strode was tenant for life only, and gave their verdict for the defendants.

Bompas, Serjt., now moved for a new trial, on two grounds :

First, that the defendants were estopped from disputing the title of the lessor of the plaintiff, he claiming title under Col. John Strode, their original lessor. Secondly, that the judgment in the former ejectment ought not to have been received in evidence.

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First—The defendants had no legal right to dispute the title of the lessor of the plaintiff, as the parties stood in the situation of lessor and lessee. This does not come within the principle of the cases which have established, that the lessee may shew that his landlord's title has determined, as in *England d. Syburn v. Slade* (1), *Doe v. Ramsbotham* (2), and *Doe v. Watson* (3). But the question here is, whether the defendants are to be allowed to set up this defence contrary to the words of the covenant in the lease, to give up the possession of the premises to the lessor, his heirs and assigns. It is submitted that they cannot be allowed to set up an interest contrary to an express covenant.

(PARKE, B. : Is there any case which establishes that the words of such a covenant make any difference? Who could have sued for a breach of this covenant, for not giving up possession at the end of the term? It was not a covenant running with the land, and therefore the heir could not sue. This lease does not operate as an estoppel, because Col. Strode having a life estate, had a right to grant a lease for twenty-one years, determinable upon his life, and therefore an interest passed, and where an interest passes, there is no estoppel. In Co. Litt. 47 b, it is said, "A lessee for the life of B. makes a lease for years, by deed indented, and after purchases the reversion in fee; B. dieth; A. shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest, and determined by the *death of B." That case is similar to the present, except that there the reversion was purchased by the lessor instead of the lessee. That shews that an interest passes, and then there is no estoppel. The old doctrine is, that if an interest passes, and here it does pass for twenty-one years, then there is no estoppel.)

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(1) 2 R. R. 498 (4 T. R. 682).

(3) 2 Stark. 230.

(2) 3 M. & S. 516.

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Secondly, the judgment in the former ejectment ought not to have been admitted in evidence in this action against the lessor of the plaintiff. A judgment in one action of ejectment is not evidence in another action of ejectment, because the parties are not the same, and the term is not the same; it is technically another term.

(LORD ABINGER, C. B.: Its being a different term signifies nothing. The question is, are they the same parties? When there is the same plaintiff and defendant, the judgment is admissible in evidence. It is uniformly so laid down.)

That rule, it is submitted, does not apply to ejectment. The term here is not the same as the term in the former ejectment.

(LORD ABINGER, C. B.: Suppose there had been a real lease, and the lessee had been ejected, and brought his action, could it not be shewn that his landlord had previously granted a lease, but that his lessee had been turned out of possession by the judgment of a court of law?

PARKE, B.: The rule is, that if the parties are substantially the same, the judgment in the former ejectment may be given in evidence; but it is not an estoppel, unless it be pleaded.)

The text books treat it as if it were not admissible; and Mr. Phillips, in his treatise on Evidence, seems to think that it is not evidence, unless conclusive.

[732] LORD ABINGER, C. B.:

A judgment in ejectment is not conclusive evidence, because a party may have a title to possession and to grant a lease at one time, and not at another; but it is clearly admissible in evidence.

PARKE, B.:

A judgment is in no case conclusive, unless pleaded by way of estoppel. It cannot be pleaded in ejectment, because the defendant is bound, by the terms of the consent rule, to plead

not guilty. But if the parties are the same, it is evidence to go to the jury. In this case, the former judgment shews that the lessor of the plaintiff had no title to demise the premises in question on the particular day of the demise.

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ALDERSON, B.:

It is laid down in Buller's Nisi Prius, 232, that a verdict in one action of ejectment may be given in evidence in another ejectment between the same parties. And there is the same point to be found in 4 Bacon's Abr. Evid. (F), which is precisely in point.

Rule refused.

CREASE v. BARRETT.

(2 Cr. M. & R. 738—739; S. C. Tyr. & Gr. 112; 5 L. J. (N. S.) Ex. 8.)

Where, in granting a new trial, the Court directed that certain portions of the evidence should be admitted upon the proof already given: Held, that the plaintiff, who had a verdict, was not entitled to the costs of fair copies of the shorthand-writer's notes of the evidence, for the use of counsel: but that he ought to have applied for copies of the Judge's notes.

1835.
*Erck. of
Pleas.*
[738]

On the new trial being granted in this cause (1), it was made one of the terms of the rule, that certain portions of the evidence should be admitted upon the proof given on the first trial. After preparations had been made for the second trial, the case was compromised, the plaintiff taking a verdict for the smaller toll of tin. On the taxation of costs, the plaintiff claimed to be allowed for three fair copies of the shorthand-writer's notes of the evidence on the trial, as being necessary to enable the *counsel to determine what evidence should be offered again. The Master having disallowed these costs, *Sir W. Follett* obtained a rule for a review of the taxation.

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Erle shewed cause, and urged that the claim was wholly unprecedented. The counsel ought to take notes of the evidence; if their notes were not sufficient, and the plaintiff thought it useful to his case to have fuller statements of the evidence,

(1) See 40 R. R. 779 (1 Cr. M. & R. 919).

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he ought to pay for them himself, and not charge them upon the defendant.

Sir W. Follett, in support of the rule :

The shorthand notes were *bonâ fide* and necessary instructions to counsel ; and, as such, the cost of them ought in fairness to be allowed. This was not an ordinary case, the rule for a new trial having been moulded in a peculiar manner.

(PARKE, B. : Why could you not apply to Lord LYNTHURST's clerk for a copy of his notes of the evidence, relating to the particular matters in question ; they would have furnished you with all the information that could be needed ?)

It is generally understood that Judges are unwilling to have their notes copied.

PARKE, B. :

I am not aware of that ; I should make no difficulty whatever about it. To allow these costs would be opening a door to claims for the costs of the shorthand-writer's notes in every case. You might perhaps be entitled to the probable expense you would have incurred by applying for and obtaining a copy of Lord LYNTHURST's notes from his clerk : but that would be so very trifling, that it is not worth while to come to the Court. The rule must be discharged.

Rule discharged.

1835.

SEELY v. POWERS (1).

(3 Dowling, Pr. Cas. 372—376.)

[372]

If a Judge, of his own authority, discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial.

MARTIN applied for a rule *nisi* to review the Master's taxation. The facts were these : The cause was tried before Mr. Justice

(1) Followed in *Wall v. London & S. W. Ry. Co.* (1856) 11 Ex. 696 ; 25 L. J. Ex. 93, 94.—R. C.

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Littledale; and the jury, after retiring, remained out all night. The next morning, being still unable to agree, the learned Judge, by his own authority, discharged them. Subsequently the parties again came down to trial, and the plaintiff had a verdict. On taxation, the Master refused to allow the costs of the first trial; and it was now sought to review that taxation. He contended that the Master was wrong in the view which he had taken. He cited the case of *Harrison v. Bennett* (1), where, during the trial of the cause, one of the jury absconded, and the other jurors were accordingly discharged, the plaintiff refusing to take a verdict from the eleven. The cause was again tried, and the plaintiff obtained a verdict. The Court of Exchequer there held that the plaintiff was entitled to the costs of both trials. Again, in *Burchall v. Ballamy* (2), the Court directed, "that, for the future, in all cases where a cause goes down to trial, and goes off upon any occasion, without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial, the costs of such former abortive going down to trial shall be taxed and allowed to the party finally prevailing, in the same manner as if the cause had gone off upon a *remanet*." This case was like that of a *remanet*, where the party ultimately successful is entitled *to be indemnified for his expenses attending the first Assizes or sittings.

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A rule *nisi* having been granted—[and argued,—the Court took time for consideration.]

PATTESON, J.:

[375]

In this case, the jury having been out all night, and not agreeing, the Judge in the morning discharged them of his own proper authority. Afterwards, the cause was tried, and the plaintiff succeeded. The Master, on the taxation of costs, has rejected those of the first trial. This rule calls for a review of such taxation. On the one hand, the case is likened to that of a *remanet*, in which the costs of the first attendance are always allowed; and *Harrison v. Bennett* (1) was relied on, where a juror having absconded, and the Judge having discharged the rest, the Court held, that the plaintiff, having succeeded on a second trial,

(1) 1 Dowl. P. C. 627.

(2) 5 Burr. 2694.

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was entitled to the costs of the first. On the other hand, the case is likened to one of a juror withdrawn by consent, where neither party has costs. That, it is answered, is matter of agreement; and as the consent or agreement is silent as to costs, none are allowed. I cannot, however, see any difference in reason between the withdrawing a juror by agreement and the discharge of the jury by the Judge. In either case it is done because the jury cannot agree. In the case of a *remanet*, there is no reason to suppose that the jury at the first trial would have disagreed. *Harrison v. Bennett* (1) may be distinguished, because the first jury as well as the second there found for the plaintiff. I find it laid down in *Burchall v. Ballamy* (2), that the rule as to *remanets* is to be extended to similar cases; and, accordingly, where a cause goes off for defect of jurors, the costs are allowed to the party who ultimately succeeds. In this Court, where a new trial is granted without mention of costs, *those of the first trial are not allowed, though the same party succeeds on the second. This, however, may be because the Court are dissatisfied with the first verdict, and yet the second may be quite right, from additional evidence or other causes. Here there is no fault on either side, nor any thing with which the Court is dissatisfied, but a mere accident in the cause, by which the first attempt at trial is rendered abortive. *Non constat* which way the first jury would have determined. Upon the whole, therefore, I am of opinion that this case must follow the practice in cases of a juror being withdrawn, and that the rule must be discharged.

Rule discharged.

1835.

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DOE D. BAKER v. ROE.

(3 Dowling, Pr. Cas. 496.)

The Court will stay proceedings in an action if it appears to be doubtful whether the action is brought with the knowledge and consent of the plaintiff.

E. V. WILLIAMS had obtained a rule *nisi* for staying the proceedings in this action on payment of costs, on the ground

(1) 1 Dowl. P. C. 627.

(2) 5 Burr. 2693.

that the action was proceeded with without the authority or knowledge of the lessor of the plaintiff.

DOE d.
BAKER
v.
ROE.

The *Solicitor-General* and *Wightman* shewed cause :

In the affidavits in support of the motion, it was alleged that the lessor of the plaintiff had been out of her mind for a twelvemonth. The tenant was the son-in-law of the lessor of the plaintiff, and swore that he believed that she did not intend to turn him out of the farm. Her son and her regular medical attendant joined in the affidavits in support of the motion. On the other side were the affidavits of the attorney and another son, and also of a medical man who had seen her once some time before, who swore that she was not out of her mind, and had authorized the action, and knew that it was going on. There was, however, no affidavit on either side by the mother herself.

PARKE, B. :

I think we ought to be satisfied that the mother is cognizant of the proceedings which are going on in her name, and at present that does not sufficiently appear. The rule must therefore be absolute for staying the proceedings till the further order of the Court, and until the Court is satisfied that the action is proceeding with her knowledge and authority.

Rule absolute accordingly.

JORDAN v. HUNT.

(3 Dowling, Pr. Cas. 666—667; S. C. 1 Gale, 159.)

1835.

[666]

An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them; it must be shewn affirmatively, that the settlement was come to for the purpose of cheating the attorney.

R. V. RICHARDS obtained a rule *nisi*, calling on the plaintiff to shew cause why all further proceedings should not be stayed, and why the plaintiff's attorney should not pay the costs of all proceedings since the 24th of March, when he had notice that

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the action had been settled, and that the plaintiff had agreed to pay his own costs.

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Miller shewed cause :

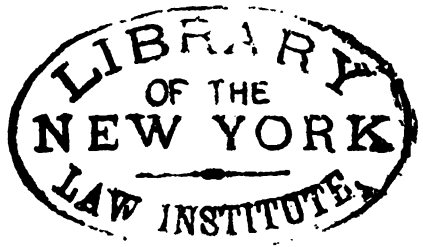
It appeared from the affidavits, that the action was brought to recover 14*l.* 15*s.* 2*d.* ; that the plaintiff's attorney had offered to settle the action by abating 6*l.* if the balance with the costs was paid, but this offer was declined by the defendant's attorney ; and that the defendant, without the knowledge of the plaintiff's attorney, had afterwards settled the action with the plaintiff himself, who was in low circumstances, and insolvent, and about to go to America. The plaintiff's attorney had therefore proceeded with the action for the purpose of recovering his costs. It was now contended, that he was justified in so doing, inasmuch as the defendant's settling the action with the plaintiff, without any intimation given to his attorney, and when it was known that costs had been incurred, was a fraud upon the plaintiff's attorney.

PARKE, B. :

There is no occasion to cite authorities, because the principle applicable to cases of this nature is perfectly clear. It is quite competent to parties to settle actions behind the backs of the attornies, for it is the client's action, and not the attorney's. It must be shewn affirmatively that the settlement was effected with the view of cheating the attorney of his costs. Nothing would be got by letting the case go to trial, for the settlement after action brought may be pleaded in bar to the further maintenance of the action, and would be a good answer to it.

The rest of the Court concurred.

Rule absolute.



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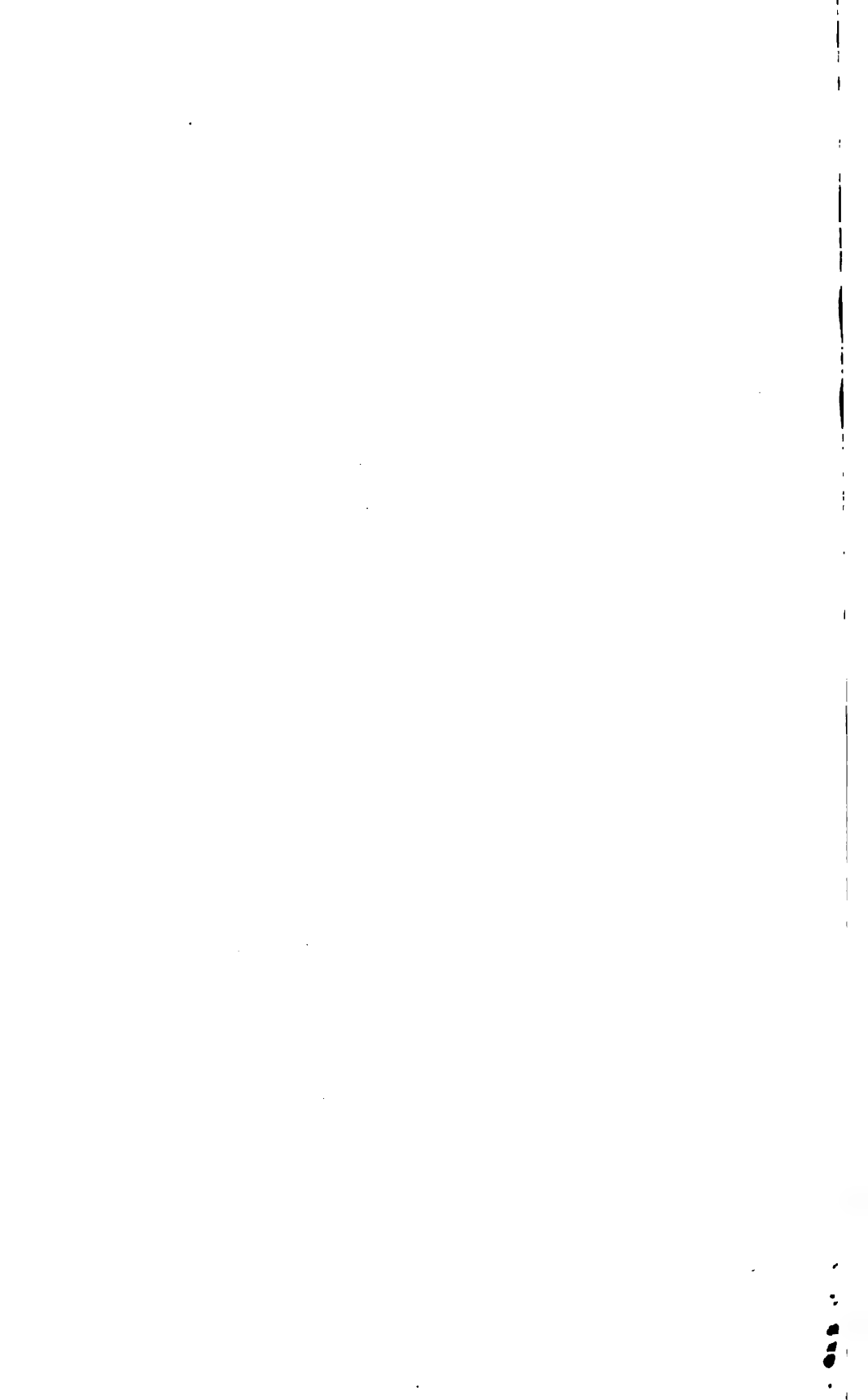
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